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J. Anthony Van Duzer*

A Canadian Perspective on Fifty Years of International Economic Law

In 1970, "international economic law" (IEL) was not a distinct academic subject. Fifty years later, IEL has become an important and well-recognized field of legal enquiry, though its boundaries remain unclear. Globalization of trade and investment activity and the concomitant proliferation of trade and investment treaties over the last 50 years have been key drivers of academic interest in IEL and its transformation. The impacts of trade and investment on the protection of the environment and health, Indigenous, labour, and human rights, development, and other policy priorities have become significant subjects of academic discourse and are increasingly addressed in trade and investment treaties. IEL scholarship has become methodologically diverse, incorporating empirical and inter-disciplinary analysis, and embraces a wide range of theoretical and critical perspectives. This paper surveys the development of international trade and investment law as part of IEL from 1970 to 2021 from a Canadian point of view.

En 1970, le « droit économique international » (DEI) n'était pas une discipline universitaire distincte. Cinquante ans plus tard, il est devenu un domaine de recherche juridique important et bien reconnu, même si ses frontières restent floues. La mondialisation des activités de commerce et d'investissement et la prolifération concomitante des traités en la matière au cours des cinquante dernières années ont été les principaux moteurs de l'intérêt universitaire pour le droit en matière d'investissement et sa transformation. L'impact du commerce et de l'investissement sur la protection de l'environnement et de la santé, les droits des autochtones, les droits du travail et les droits de l'homme, le développement et d'autres priorités politiques sont devenus des sujets importants du discours universitaire et sont de plus en plus abordés dans les traités sur le commerce et l'investissement. La recherche sur le DEI s'est diversifiée sur le plan méthodologique, en intégrant des analyses empiriques et interdisciplinaires et en embrassant un large éventail de perspectives théoriques et critiques. Cet article examine le développement du droit international du commerce et de l'investissement dans le cadre du DEI entre 1970 et 2021, d'un point de vue canadien.

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Introduction

Fifty years ago, "international economic law" (IEL) was only beginning to develop into a distinct discipline.[1] In 1970, a relatively small group of legal scholars worldwide including a few Canadians were engaged in disparate areas of research that touched on legal rules for international economic activity. For example, some focused on the *General Agreement on Tariffs and Trade* (*GATT*).[2] A largely separate group of scholars was preoccupied with understanding international law's protection of foreign investors.[3] While the *GATT* and investment protection might be covered as units in a general survey course in public international law, there were no courses on IEL as a distinct subject or IEL graduate programs at Canadian law schools and few elsewhere.[4] There were no specialized IEL journals.

Today, IEL has evolved into a recognized area of legal enquiry, though its boundaries are not clear or agreed.[5] Two of the fastest-growing and most vibrant areas of international law—international trade and investment law—are important elements of IEL. Globalization of trade and investment

1. Vagts suggests that the term became "current" after World War II (Detlev F Vagts, "International Economic Law and the American Journal of International Law" (2006) 100:4 AJIL 769 at 769). Its recognition as a discrete area of enquiry is often attributed to Georg Schwarzenberger. Charnovitz cites Georg Schwarzenberger, *The Principles and Standards of International Economic Law* (1966) Receuil des Cours 1 [Schwarzenberger, *Principles and Standards*] as well as an earlier work by Schwarzenberger, "The Development of International Economic and Financial Law by the Permanent Court of Justice" (1942) 54 Juridical Rev 21 and the pioneering work of Feilchenfeld (Ernst Feilchenfeld, *The Next Step: A Plain Man's Guide to International Principles* (Oxford: Basil Blackwell, 1938)). See Steve Charnovitz, "What is International Economic Law?" (2011) 14:1 J Intl Econ L 3 at 12-15 [Charnovitz, "What is IEL?"].

2. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) [*GATT*]. See e.g. John Jackson, *World Trade and the Law of the GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis: Bobbs-Merrill, 1969) [Jackson, *Law of the GATT*]; Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger, 1975).

3. See e.g. Chittharanjan Felix Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon, 1967).

4. E.g. international trade was just one of 38 chapters in a 1974 survey of Canada's engagement with international law: Ivan Bernier, "La Réglementation canadienne en matière de commerce et de douanes" in Ronald St John MacDonald, Gerald L Morris & Douglas M Johnston, eds, *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 726. Two more chapters dealt with economic issues: John EC Brierly, "International Trade Arbitration: The Canadian Viewpoint" 826 and Ivan Feltham & William Rauenbusch, "Economic Nationalism" 885, though the latter was more about economic policy than law. In 1996, McRae provided examples of US, UK and French international law texts from the 1960s that contained little on international trade as a distinct area of international law meriting study (Donald M McRae, "The Contribution of International Trade Law to the Development of International Law" (1996) 260 Recueil des Cours 109 at 112-113).

5. Vagts, *supra* note 1; Charnovitz, "What is IEL?," *supra* note 1 at 1. Dunoff calls the boundaries "porous and unstable" (Jeffrey Dunoff, "Subject Matter of International Economic Law" in Thomas Cottier & Krista Nadakavukaren, eds, *Encyclopedia of International Economic Law* (Cheltenham: Elgar, 2019) at 3).

activity and the concomitant proliferation of trade and investment treaties over the last 50 years have been key drivers of academic interest in IEL and its transformation. The very prominent role and active use of dispute settlement at the World Trade Organization (WTO) and investment treaty arbitration have made IEL one of the most dynamic areas of international law. International economic law dispute settlement itself has become an increasingly important subject of enquiry. There is enourmous academic discourse focussed on the impact of trade and investment activity and the the treaties that govern it on the protection of the environment and health, as well as Indigenous, labour, and human rights, development, and other policy priorities. In turn, these subjects are increasingly addressed in trade and investment treaties. Over time, IEL scholarship has become ever more sophisticated and methodologically diverse, incorporating empirical and inter-disciplinary analysis, and embracing a wide range of theoretical and critical perspectives.

This paper maps the development of international trade and investment law as part of IEL from roughly 1970 to 2021 from a Canadian point of view beginning with some definitional considerations followed by a survey of key changes to international economic activity and the increasingly dense global network of trade and investment treaties.[6] The remainder of the paper provides an overview of the evolution of IEL as a discipline focusing on developments in methodology, theory, and critical perspectives.

I. *What is international economic law (IEL)?*

International Economic Law can be conceived broadly as embracing all the law, domestic and international, that governs international economic activity. Understood this way, IEL includes

- international laws with a regulatory character, like treaties and other international instruments, including soft law, that impose obligations on states in relation to trade in goods and services, investment, taxation, monetary policy, and competition,
- domestic laws on these same subjects to the extent relevant to international economic activity, and
- international economic institutions, like the World Bank, International Monetary Fund, and WTO.

This broad conception of IEL would also include private law subjects related to international economic transactions, like the laws governing international contracts, some of which may derive from international

6. A brief survey of earlier developments related to Canada is provided by Jonathan Fried, "Introduction" in Oonagh Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law* (Waterloo, ON: CIGI, 2018) 185.

instruments, like the *United Nations Convention on Contracts for the International Sale of Goods*,[7] and conflicts of laws.[8] Such a broad conception is needed to illuminate the complex interlinkages between domestic and international legal regimes and the relationship of IEL to a wide range of policy concerns like labour rights, the environment, and international development.

Despite strong and increasing support among some scholars,[9] those who have sought to develop rigorously such a broad conception of IEL have struggled to divine a coherent vision that is not so wide-ranging as to lose all meaning and operational utility.[10] Many narrow the focus to public international law aspects, especially international trade and investment law.[11]

This paper focuses largely on the evolution of the formal dimensions of international trade and investment law over the past 50 years, with particular emphasis on Canadian points of view. Both international trade and investment law are treaty-based regimes agreed to by states and primarily directed at the behaviour of states, though strongly implicating private actors. As a result, international trade and investment law can be discussed more coherently and efficiently than would be possible if a survey of IEL in the broad sense described above were undertaken.

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7. *United Nations Convention on Contracts for the International Sale of* Goods, 11 April 1980, 1489 UNTS 3, 19 ILM 668 (entered into force 1 January 1988).

8. Charnovitz, "What is IEL?," *supra* note 1 at 6.

9. In Schwarzenberger's view, only public international law subjects are part of IEL (Schwarzenberger, *Principles and Standards*, *supra* note 1 at 5, 7-8). By contrast, Trachtman says the diverse aspects of IEL are not separable from a pragmatic business point of view and that international and national law are necessarily interdependent (Joel Trachtman, "The International Economic Law Revolution" (1995-1996) 17:1 U Pa J Intl Econ L 33 at 39 [Trachtman, "Revolution"]). Bederman adopts this view (David Bederman, *International Law Frameworks* (New York: Foundation Press, 2001) at 141). In 2009, Cottier noted the focus of international economic law scholarship on the trading system and strongly argued for a broader and interdisciplinary approach (Thomas Cottier, "Challenges Ahead in International Economic Law" (2009) 12:1 J Intl Econ L 3).

10. See e.g. Charnovitz, "What is IEL?," *supra* note 1 at 6; McRae, *supra* note 4 at 121. Jackson suggested that as much as ninety per cent of public international law is international economic law (John H Jackson, "International Economic Law: Reflections on the 'Boilerroom' of International Relations" (1995) 10:2 American U J Intl L & Pol'y 595 at 596 [Jackson, "Boilerroom"].

11. E.g. Dupuy suggests that IEL should be limited to its public international law subjects (Pierre-Marie Dupuy, "Relationship of International Economic Law to Other Areas of Public International Law" in Cottier & Nadakavukaren, *supra* note 5 at 6-7). Ignaz Seidl-Hohenveldern, *International Economic Law*, 3rd revised ed (Dordrecht: Kluwer Law International, 1999) limits IEL to international law related to "economic exchanges" (at 1). Qureshi & Ziegler recognize the importance of a "holistic perspective" but focus on public international law issues including taxation, labour mobility and standards, and international development as well as trade, investment, and monetary law (Asif H Qureshi & Andreas Ziegler, *International Economic Law*, 4th ed (London: Sweet and Maxwell, 2019) at 8). Collins covers international development but not labour mobility or standards (David Collins, *Foundations of International Economic Law* (Cheltenham: Elgar, 2019)).

International trade and investment law are also the areas of IEL that have seen the greatest development and received the most scholarly attention over the past half-century.

There are limitations and challenges associated with this narrow and particular conception of IEL, as discussed in more detail below. Choosing to talk only about international trade and investment law is to adopt a largely state-centred approach that marginalizes the role of private actors and other critical elements of the international economic order, like international development.[12] The formal perspective adopted here does not engage directly with what goals and values are embodied in IEL or what they should be, though there is some discussion of how linkages with labour rights, the environment and other policy priorities have gained increased recognition within IEL over the period surveyed. Accordingly, this survey does not purport to fully represent the complex and dynamic nature of IEL as it has evolved over time.

II. *Changes in the economic and legal contexts*

1. *Globalization and the massive expansion of trade and investment*

The globalization of economic activity is a defining development of the past 50 years. In 1970, global goods exports amounted to just US$317 billion. By 2021, they had grown to US$22.3 trillion, an astounding seventy-fold increase.[13] Investment flows have grown only slightly less dramatically. Annual global outward foreign direct investment (FDI) flows at the end of 2020 were more than 50 times their 1970 total.[14] Economic globalization has been exhaustively studied and the focus of high praise and wide-ranging critiques.[15] In the wake of the financial crisis in 2007 and the more recent global disruptions associated with the COVID 19 pandemic and the war in Ukraine, concerns regarding the costs and skepticism regarding the benefits of globalization have become widespread.[16] Security concerns, broadly conceived, are changing how countries think about the interdependence of their economies that flows from globalization. Even

12. Qureshi & Ziegler, *supra* note 11 at 8-17. It largely ignores the role of private actors, both businesses and citizens, in norm creation, such as through contract, standard setting, and litigation.

13. "Merchandise exports by product group—annual" (last visited 15 May 2022), online: *WTO Stats* <stats.wto.org/?idSavedQuery=0b210f79-a94f-4c26-bffb-efd9836db13b> [perma.cc/TYX6-8GAF].

14. This dramatic expansion largely began with the liberalization of rules for international capital flows in the 1980s (McRae, *supra* note 4 at 28, citing Michael J Trebilcock & Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 56-60).

15. The various perspectives are effectively described and critiqued in Anthea Roberts & Nicolas Lamp, *Six Faces of Globalization: Who Wins, Who Loses, and Why It Matters* (Cambridge, MA: Harvard University Press, 2021).

16. Huiwen Gong et al, "Globalisation in Reverse? Reconfiguring the Geographies of Value Chains and Production Networks" (2022) 15:2 Cambridge J Regions, Economy & Society 165.

the main beneficiaries of globalization, China and the United States, are rethinking their trade and investment policies as a result.[17] It is not the goal of this article, however, to address these challenging issues. Whatever one thinks about the impact of globalization, there is no doubt that it has transformed the global economy with countries increasingly tied together through trade and investment relationships. These changes have been facilitated by IEL and, at the same time, transformed it.

2. *Changes in the nature of international economic activity*

The nature of international economic activity has changed over the past 50 years in many ways that have affected the scope of international trade and investment rules and, accordingly, the subjects of IEL research. Three are noted below.

First, the proportion of trade in agricultural products and raw materials has declined compared to manufactured goods which now account for almost sixty-five per cent of global exports by value.[18] The shift towards high value-added and technological goods has made the protection of the embedded intellectual property a key trade issue.

Second, services supply has become the dominant activity in most countries[19] and services trade has expanded substantially. This is particularly noticeable in communications, distribution, financial, and business services, facilitated by digitalization and improvements in communications technology and reduced communications and transportation costs.[20] In 1970, services delivered across borders represented about nine per cent of the value of total trade. Today it accounts for more than twenty per cent.[21] But that does not include services that are delivered by foreign suppliers from a commercial presence in the territory of the service consumer, the largest category of international services supply. The WTO estimates that when services delivered through this mode are included, services represent almost forty-three per cent of the value of total trade and services

17. The transition in trade and investment policy is described in Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, "Toward a Geoeconomic Order in International Trade and Investment" (2019) 22:4 J Intl Econ L 655.

18. "Merchandise trade by product" (last visited 25 May 2022), online: *UNCTAD e-Handbook of Statistics* <hbs.unctad.org/merchandise-trade-by-product/> [perma.cc/DH7W-CUAZ].

19. In developed countries, services contribute around seventy-five per cent of GDP and in developing country economies, services represent a significant and growing proportion of GDP (WTO, "World Trade Report 2019: The Future of Services Trade" (2019) at 7, 15, online (pdf): <wto.org/nglish/res_e/booksp_e/00_wtr19_e.pdf> [perma.cc/MUM9-M3HT] [*World Trade Report 2019*]).

20. *Ibid* at 14. See UNCTAD, *World Investment Report 2004: The Shift to Services* (New York: United Nations, 2004).

21. "WTO Stats" (last visited 15 May 2022), online: *WTO Stats* <stats.wto.org/> [perma.cc/Y47T-SKQH].

trade overall is growing more quickly each year than trade in goods.[22] The proportion of global investment in services sectors has increased too. In the early 1970s, only about one quarter of the global stock of FDI was in services. By the mid-2000s, services accounted for sixty per cent of the global total, though by the end of 2020 FDI stock in services had declined to around fifty-two per cent.[23] The increased importance of services trade, especially to developed countries, led to services being added to the multilateral trade negotiation agenda in 1986.[24] Services rules are now routinely included in trade treaties.

Finally, foreign investment has changed in ways that have affected trade in a dramatic fashion. Historically, most FDI was "horizontal." Businesses in one country invested in a foreign country to produce goods for sale in that country as a substitute for exporting domestically produced goods to that country.[25] With globalization, "vertical" FDI emerged as the dominant form of investment. With the benefit of dramatic improvements in communications technology, as well as reductions in transportation costs and trade barriers, firms increasingly allocated stages of their productive process to different countries based on discrete local advantages, like the cost of labour or other production inputs.[26] Multinational enterprises (MNEs) broke up their production of goods into a series of discrete tasks and allocated those tasks to subsidiaries and third-party suppliers around the globe. Trade was created by the transfer of intermediate goods and services from each country in which a task was performed to the next country in which a task was to be completed. Ultimately, finished goods were imported into MNEs' home markets or exported to third countries.[27] Intra-firm trade in these global value chains is one of the reasons for the substantial growth in trade in the past 50 years. Around seventy per cent

22. *World Trade Report 2019*, *supra* note 19 at 7.

23. UNCTAD, "New FDI Pattern Emerging, Says UNCTAD," press release, Geneva, 18 October 2003 online: <https://unctad.org/press-material/new-fdi-pattern-emerging-says-unctad>; UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (New York: United Nations, 2021) at 9-11.

24. The agenda for the Uruguay Round was set out in Ministerial Declaration on the Uruguay Round, GATT Ministerial Declaration of 20 September 1986, 33rd Supp BISD (1987) 19.

25. Ari van Assche, "Trade and Foreign Direct Investment in the 21st Century" in J Anthony VanDuzer & Patrick Leblond, eds, *Promoting and Managing International Investment: Toward an Integrated Policy Approach* (London: Routledge, 2020) 31 at 32-33.

26. *Ibid*.

27. The nature and implications of global value chains is explained in Eugene Beaulieu & Kelly O'Neill, "The Economics of Foreign Direct Investment and International Investment Agreements" in VanDuzer & Leblond, *supra* note 25, 99 at 100-104.

of trade now consists of the supply of intermediate goods and services by one unit of an MNE to another.[28]

As discussed below, the integration of countries into global value chains has meant that IEL rules on trade and investment play an increasingly significant role in domestic policy-making across a wide range of areas, including economic policy, but also extending to other areas like environmental protection and human rights.

3. *Impact of globalization in Canada*

Globalization and its transformative effects have impacted Canada substantially. Canada has always been a trading nation but its integration into the global economy through trade and investment has increased over the past 50 years. In 1970, Canada's trade-to-GDP ratio was over forty per cent. It now exceeds sixty per cent.[29] Inward foreign direct investment has grown even more strongly. In 1970, Canada's stock of inward FDI represented less than thirty per cent compared to GDP. In 2020, it was almost sixty per cent.[30] In 1996, the stock of outward Canadian foreign direct investment exceeded inward direct investment for the first time and, by 2020, Canada's outward FDI stock had reached more than 118% of GDP.[31] As discussed below, Canada's deep integration into the global economy has encouraged governments of all stripes to be very actively engaged in international economic rule-making to secure predictable access to markets for Canadian goods and services and the protection of Canadian investors. It has also encouraged significant Canadian academic interest in IEL.

4. *Proliferation of trade and investment treaties*

a. *Introduction*

Globalization has both encouraged and been encouraged by the proliferation of trade and investment treaties over the past 50 years. Globalization and the creation of global value chains has been facilitated by trade treaties reducing barriers to trade and securing market access and investment treaties guaranteeing protection for foreign investors. At the

28. "Global value chains and trade" (last visited 15 May 2022), online: *OECD* <oecd.org/trade/topics/global-value-chains-and-trade/> [perma.cc/3BH9-M6KC].

29. "Trade in goods and services" (last visited 15 May 2022), online: *OECD Data* <data.oecd.org/trade/trade-in-goods-and-services.htm> [perma.cc/5CRY-QHJ7]. By comparison the same ratio for the US, Canada's largest trading partner, is less than twenty per cent.

30. "Country statistical profile: Canada 2022/1" (15 April 2022), online: *OECD* <oecd-ilibrary.org/economics/country-statistical-profile-canada-2022-1_4b8c267b-en> [perma.cc/VCV8-VCQJ].

31. OECD, Directorate for Financial and Enterprise Affairs and Statistics Directorate, *International Trade, Foreign Direct Investment and Global Value Chains: Canada Trade and Investment Statistical Note* (Paris: OECD, 2017).

same time, globalization meant that more and more countries had a stake in international rules governing trade and investment. This section briefly surveys the development of the international trade and investment regime and Canadian participation in it.

b. *The international trade regime*

The modern multilateral trading system began with the 1947 *GATT*.[32] Canada was an original contracting party along with 22 other countries. A more ambitious project to establish an International Trade Organization administering rules that included investment was not successful.[33] As a result, investment rules were left to be developed, for the most part, on the basis of bilateral investment treaties (BITs). To this day, there are no comprehensive multilateral treaty rules on investment.[34] The divergent historical development of the trade and investment treaty regimes accounts for some of the fragmentation of IEL scholarship, as discussed below.

The scope of the multilateral trade regime and the number of participating states expanded substantially in 1995 with the coming into force of the WTO Agreements.[35] These agreements have created a virtually global system that now includes 164 WTO members with 24 more countries seeking to accede.[36] The WTO Agreements impose comprehensive rules related to trade in goods, including tariff limits, customs procedures, technical barriers to trade, such as those embedded in domestic product standards, government procurement, subsidies, anti-dumping, countervailing duties, agriculture, and trade-related investment measures, as well as trade in services and intellectual property. The *Dispute Settlement Understanding* created as part of the WTO provides a highly developed process for the settlement of disputes regarding the application of WTO rules by ad hoc dispute settlement panels and a standing appellate body.[37]

Bilateral, regional, and other kinds of preferential trade treaties negotiated between states desiring rules to govern their relations that go

32. *GATT*, *supra* note 2.
33. *Final Act of the United Nations Conference on Trade and Employment (Havana Charter)*, 24 March 1948 (never entered into force).
34. Efforts to establish a Multilateral Investment Agreement under the auspices of the Organization for Economic Cooperation and Development failed in 1997. See M Sornarajah, *The International Law on Foreign Investment*, 5th ed (Cambridge, UK: Cambridge University Press, 2021) at 36.
35. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation*, 15 April 1994, 1867 UNTS 14 (entered into force 1 January 1995).
36. "Members and Observers" (last visited 15 May 2022), online: *WTO* <wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> [perma.cc/6WRC-EKMP].
37. *Understanding on the Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) [*DSU*].

beyond the multilateral rules for trade and create preferences for trade between them have long been part of the trade regime. The failure to date of the WTO negotiations commenced in Doha in 2001 to achieve new multilateral trade rules, has encouraged their proliferation.[38] Preferential trade treaties have multiplied rapidly since the early 1990s.[39] At the end of 2021, they had reached over 580 (compared to only five treaties 50 years earlier) and have become a critical part of the global regime.[40]

c. *The international investment regime*

International rules requiring states to meet certain standards for the protection of foreign investment have their origins in customary international law and treaties of Friendship, Commerce and Navigation negotiated following World War II.[41] The first BIT was concluded between Germany and Pakistan in 1959.[42] Unlike the WTO agreements, which are detailed, nuanced, and replete with exceptions and mechanisms to accommodate distinctive national policy priorities, most BITs are short documents that provide very general and unqualified standards for a party state to meet with respect to their treatment of investors from the other state, such as a prohibition against expropriation without compensation and guarantees of fair and equitable treatment. Typically, these commitments are backed up by an arbitration process allowing protected investors to claim financial compensation where the state fails to meet those standards ("investor-state arbitration").[43] Traditionally, most BIT negotiations were initiated by developed countries seeking commitments from developing countries. Their goal was to protect their businesses operating in developing countries from local state action. Developing countries hoped that by committing to protect developed country investors, they would attract investment conducive to their development.[44] The number of BITs

38. Rafael Leal-Arcas, "Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism" (2011) 11:2 Chicago J Intl L 597.

39. Lorand Bartels & Frederico Ortino, eds, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) at 1.

40. "Regional Trade Agreements Database" (last visited 15 May 2022), online: *WTO* <rtais.wto.org/UI/PublicMaintainRTAHome.apxs> [perma.cc/FGP5-VV6U]. These are only agreements notified to the WTO.

41. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer, 2009) at 42.

42. *Ibid*.

43. Lukas Vanhonnaeker, "International Investment Agreements" in VanDuzer & Leblond, *supra* note 25 at 200-202; Patrick Dumberry & J Anthony VanDuzer, "Investor-state Arbitration" in VanDuzer & Leblond, *supra* note 25 at 223. The system for the resolution of disputes in which investor-state arbitration plays a substantial part is sometimes referred to as the investor-state dispute settlement system or "ISDS."

44. Vanhonnaeker, *supra* note 43. As noted below, there is conflicting evidence as to whether

expanded at an accelerating pace beginning in the mid-1980s alongside growth in FDI. The annual number of new BITs peaked in 1996 at more than 200, though new BITs continue to be signed each year. Over time, investment obligations began to be incorporated in treaties between developed countries, especially comprehensive trade and investment treaties like the *North American Free Trade Agreement* (*NAFTA*).[45] In recent years, the proportion of preferential trade treaties with investment provisions signed annually has outstripped the number of BITs.[46] At the end of 2020, there were over 3,300 BITs and more than 400 preferential trade and other treaties with investment provisions world-wide.[47]

d. *Canadian engagement in IEL rule-making*

Canadian governments have been actively involved in the creation and operation of the modern trade and investment treaty regime, including through participation in dispute settlement proceedings. Canada entered into its first free trade agreement with its largest trading partner, the United States, in 1988.[48] *NAFTA* came into force in 1994 and was recently replaced by the *Canada-United States-Mexico Agreement* (*CUSMA*).[49] In the last twenty-five years, Canada entered into many other trade and investment agreements, including the *Comprehensive Economic and Trade Agreement* (*CETA*) with the European Union (2017), the *Comprehensive and Progressive Trans-Pacific Partnership* (*CPTPP*) with countries on the Pacific Rim (2018), and 12 other free trade agreements.[50] In total, these

investment commitments have this effect (see note 184 and accompanying text) and the need for and scope of investor protection has been challenged by academics, civil society groups and governments.

45. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

46. UNCTAD, *IIA Issues Note: Recent Developments in the IIA Regime: Accelerating IIA Reform* (Geneva: United Nations, 2021). In 2020, 21 new international investment agreements (IIAs) were signed (six BITs and 15 preferential trade and investment treaties). Twelve of the new treaties were negotiated by the UK to replace EU treaties following Brexit. Forty-two investment treaties (mostly BITs) were terminated in that year.

47. *Ibid*.

48. *Canada–United States Free Trade Agreement*, 2 January 1988, 27 ILM 28, c 19 (entered into force 1 January 1989) [*Canada-US FTA*].

49. *NAFTA*, *supra* note 45; *Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020); *Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 No 6 (entered into force 1 July 2020) [collectively *CUSMA*].

50. *Comprehensive Trade and Economic Agreement*, Canada and Europe, 30 October 2016 (provisionally entered into force 21 September 2017), online: *Global Affairs Canada* <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> [perma.cc/CY6E-ZVW7] [*CETA*]; *Comprehensive and Progressive Trans-Pacific Partnership Agreement*, Canada, Australia, Japan, Mexico, New Zealand, Singapore, Vietnam, Brunei,

agreements involve 51 countries that account for more than sixty per cent of global GDP.[51] These treaties go beyond Canada's WTO commitments and most include investment obligations comparable to those found in BITs. The current Canadian government has prioritized inclusive trade and has negotiated extensive provisions in recent trade agreements on transparency, labour rights, the environment, sustainable development, small and medium-sized enterprises, gender, and Indigenous peoples.[52]

Canada signed its first BIT in 1979.[53] As of 31 December 2021, Canada was a party to 38 BITs, which Canada refers to as Foreign Investment Promotion and Protection Agreements using the acronym "FIPA." It is actively negotiating additional agreements.[54] Most FIPAs are with developing countries and transition economies where there is substantial Canadian investment, but some agreements commit Canada to provide protection to investors from countries with substantial investment in Canada, like China.[55]

5. *Changes in the subjects of trade and investment agreements*

a. *Introduction*

The subject matter of trade and investment treaties has expanded over time, partly due to changes in the global economy. As discussed above, investment and trade have increasingly shifted from raw materials to services and high value-added and technological goods that contain significant intellectual property. As well, trade and investment have become even more closely connected in new ways through the establishment of global value chains. As a result, the "new issues" of services trade and intellectual property as well as investment were added to the agenda of international trade

Chile, Malaysia, and Peru, 8 March 2018 (entered into force 29 October 2018 for Canada, Australia, Japan, Mexico, New Zealand, Singapore, and Vietnam) online: *Global Affairs Canada* < international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=en> [perma.cc/E8K2-BBTL] [*CPTPP*].

51. "Canada's Free Trade Agreements" (last visited 15 May 2022), online: *Invest in Canada* <investcanada.ca/programs-incentives/canadas-free-trade-agreements> [perma.cc/2ZMR-MJSV].

52. WTO, *Trade Policy Review, Report by the Secretariat: Canada* (2019) WTO Doc WT/TPR/S/389, at paras 6, 2.2, and 2.9-2.11. See e.g. *CUSMA*, *supra* note 49, c 22 (trade and sustainable development), c 23 (trade and labour), and c 24 (trade and the environment).

53. *Agreement between the Federal Council of the Socialist Federal Republic of Yugoslavia and the Government of Canada on the Protection of Investments*, 21 December 1979, Can TS 1980/36 (entered into force 28 October 1980).

54. "International Investment Agreement Navigator" (last visited 16 November 2021), online: *UNCTAD Investment Policy Hub* <investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada> [perma.cc/TPD7-VBRG].

55. *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014/26 (entered into force 1 October 2014).

treaty-making beginning in the late 1980s.[56] Trade and investment dispute settlement became important subjects of treaty making. IEL scholarship expanded to embrace all these additions to the treaty agenda.

Perhaps most significantly, the growing impact and importance of trade and investment over the last half-century combined with the expanding reach of trade and investment rules has meant that IEL rules increasingly interact with areas of domestic regulation traditionally considered outside the trade and investment agenda, like environmental and health protection, sustainable development, and Indigenous, labour, and human rights. IEL critique and analysis helped to identify these impacts and contributed to the development of new treaty provisions in these areas.

b. *Services trade*

One of the first international trade agreements to address services trade specifically was the *Canada-US FTA* in 1988. This ground-breaking development was followed by the WTO's *General Agreement on Trade in Services* (*GATS*) in 1995.[57] Designing treaty rules for services trade involved a range of complicated issues that do not arise in relation to trade in goods. Tariffs and many other border measures that countries use to protect domestic markets are similar in structure across all jurisdictions and target traded goods. By contrast, barriers to trade in sectors, like financial, telecommunications, and professional services, are typically embedded in domestic regulatory schemes that are intended to achieve a range of public policy objectives unrelated to trade but that can nevertheless have trade-restrictive effects. For example, requiring foreign banks to operate in a country through locally incorporated subsidiaries meeting national capitalization requirements may be justified as necessary to protect depositors but may impede market access for foreign banks. Services trade liberalization, thus, often requires regulatory reform. Another challenge is that the structures and goals of services regulation are not the same across jurisdictions for a single services sector and heterogeneity increases across services sectors. The frequent need to reform services regulation to permit greater foreign access combined with regulatory diversity makes the task of designing and negotiating services trade liberalization commitments

56. See David Greenaway, "The Uruguay Round: Agenda, Expectations and Outcomes" in K A Ingersent, A J Rayner & R C Hine, eds, *Agriculture in the Uruguay Round* (New York: St Martin's Press, 1994) 8 at 8.

57. *Canada–US FTA*, *supra* note 48, c 14 (services), c 17 (financial services); *NAFTA*, *supra* note 45, c 12 (services), c 13 (financial services), c 14 (telecommunications services); *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1125 (1994) (entered into force 1 January 1995) [*GATS*].

much more difficult.[58] Bargaining for mutual concessions characteristic of trade negotiations is also more complex for services because it is much harder to estimate the relative value of commitments to change asymmetric regulatory regimes compared to commitments to reduce tariff rates. Also, while tariff reductions and other border measures are typically within the authority of a country's national government, regulatory reform often means trade ministries must negotiate with their own domestic regulators, whose mandate does not include trade liberalization, and other affected stakeholders as well as, in some cases, subnational levels of government to get agreement on trade concessions. This a particular issue in Canada where much business regulation is within provincial jurisdiction.[59]

The challenges to services liberalization are further complicated by the fact that, unlike goods trade, services trade is not limited to cross-border exchange. A services supplier in one country may supply a consumer in another (e.g. a lawyer in one country provides advice on the telephone to a client in another country), but the same service may be delivered through consumption abroad by the consumer (e.g. the client goes to the lawyer's office in the lawyer's country to get advice), and the temporary presence of the services supplier in the consumer's jurisdiction (e.g. the lawyer travels to the consumer's country to give advice). As noted above, however, the most economically important mode of supply is through a commercial presence (e.g. the lawyer sets up a business presence in the jurisdiction of the client and provides advice).[60] These different modes of supply raise different regulatory concerns and may be subject to divergent regulatory approaches in a single country.

These distinctive features of services trade and its regulation meant that services trade commitments needed novel approaches that would accommodate diversity both within and across services sectors from one country to the next and deal with regulatory structures that are justified by important domestic policy considerations unrelated to trade but that have trade restrictive effects.[61] In light of these challenges, the design and

58. These and other impediments to services trade liberalization are discussed in J Anthony VanDuzer, "A Critical Look at the Prospects for Robust Rules for Services in Preferential Trading Agreements" (2012) 39:1 LIEI 29 at 40-44 [VanDuzer, "Services"].

59. J Anthony VanDuzer & Melanie Mallet, "Compliance with Canada's Trade and Investment Treaty Obligations: Addressing the Gap between Provincial Action and Federal Responsibility" (2016) 54:1 Alta L Rev 89.

60. GATS, *supra* note 57, art 1.

61. Some of these approaches are discussed in VanDuzer, "Services," *supra* note 58 at 31-40. Because of the novelty and complexity of services rules, GATS obligations are weak and asymmetrical.

analysis of services trade obligations required new thinking and opened up new areas for research and analysis.[62]

c. *Intellectual property*

Intellectual property has long been governed by stand-alone international treaties like the *Berne Convention* on copyright and the *Paris Convention* on patents, trademarks and unfair competition, which date from the 19th century.[63] Canada had been a party to some of these treaties for many years and extended its participation in the 1990s.[64] In the mid-1990s, with *NAFTA* and the WTO Agreement on *Trade-related Aspects of Intellectual Property Rights* (*TRIPS*), intellectual property rights became part of the international trade regime and enforceable through its dispute settlement procedures.[65] This move was driven by shifts in the nature of what was being traded toward technological and high-value added goods and services that could be protected by intellectual property rights, with the US as the principal demandeur.[66] Despite its name, the *TRIPS* Agreement is not limited to trade-related aspects of intellectual property. Rather it sets detailed standards for what intellectual property rights states must protect and the procedures they must have in place to enforce those rights. Most states had to significantly enhance domestic intellectual property protection to comply with *TRIPS*, sometimes creating conflicts with policies in other areas, such as public health, the environment, and food security.[67] For example, *TRIPS* rules limiting compulsory licencing of patents constrain the ability of states to produce generic drugs for export to other countries that have no domestic production capacity and so can restrict access to medicines.[68] Since the 1990s there have been efforts, particularly by the

62. See e.g. Pierre Sauvé & Robert Stern, eds, *GATS 2000: New Directions in Services Trade Liberalization* (Cambridge, MA: Center for Business and Government, 2000).

63. *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 UNTS 3 (entered into force 4 December 1887); *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 UNTS 107 (entered into force 7 July 1884).

64. Bruce C McDonald, "Intellectual Property" in St John MacDonald et al, *supra* note 4 at 814. Canada's ambivalent embrace of international intellectual property standards is surveyed in Howard P Knopf, "Canada's Role in the Relationship of Trade and Intellectual Property" in Fitzgerald et al, *supra* note 6, 361 at 365-368.

65. *NAFTA*, *supra* note 45, c 17; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 3 (entered into force 1 January 1995).

66. Ton Zuijdwijk, "Integrating the Rules of International Intellectual Property Law into the Body of International Trade Law" in Fitzgerald et al, *supra* note 6 381 at 384. The US first started to push for stronger intellectual property rules in the 1970s.

67. Henning Grosse Ruse-Khan, "Protecting Intellectual Property Rights Under BITs, FTAs and TRIPS: Conflicting Regimes or Mutual Coherence?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge, UK: Cambridge University Press, 2011) 485.

68. This specific issue was addressed in a 2005 amendment to the TRIPS Agreement: Amendment of

US, to strengthen intellectual property protection in trade agreements, but these have had limited success.[69]

Intellectual property rights have long been protected by investment treaties and a number of recent investor-state arbitration cases have involved state actions alleged to interfere with intellectual property rights.[70] In one case against Canada, for example, a US investor claimed that a refusal to recognize its pharmaceutical patent in particular circumstances was an expropriation of the patent and a failure to grant the investor fair and equitable treatment as required under *NAFTA*.[71] The claim did not succeed.

The strong protection of intellectual property rights in recent trade and investment agreements has prompted some to characterize them as "asset protection" rather than trade and investment agreements.[72] The incorporation of wide-ranging western origin intellectual property rights as part of the international trade regime has had other troubling implications, including raising concerns about the protection of traditional knowledge and its users, often Indigenous peoples, from intellectual property rights claims of others.[73]

The increasingly important linkages between intellectual property rights and trade and investment rules brought together intellectual property and investment law scholars who have produced a burgeoning body of work.[74]

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the TRIPS Agreement, WT/L/641, 8 December 2005. The amendment took effect on 23 January 2017 when it was accepted by two thirds of WTO Members but only binds members who have accepted it until 31 December 2023.

69. Knopf, *supra* note 64 at 368-371. Knopf discusses some changes required to Canada's regime as a result of *CETA*, *supra* note 50 at 375-376.

70. Definitions of investment in IIAs typically include intellectual property rights. See e.g. *CETA*, *supra* note 50, art 8.1, "investment."

71. *Eli Lilly & Co v Canada*, Final Award (2017) (International Centre for Settlement of Investment Disputes) (Arbitrators: Albert Jan van den Berg, Daniel Bethlehem, Gary Born), online (pdf): <icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf> [perma.cc/5GY5-AZ55].

72. See e.g. Dan Ciuriak, "Asset Value Protection Agreements: An Alternative View of 21st Century Economic Partnership Agreements" (2016), online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2874526> [perma.cc/6BND-MTEH].

73. Oluwatobiloba Moody, "Trade-related Aspects of Traditional Knowledge Protection" in John Borrows & Risa Schwartz, eds, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge, UK: Cambridge University Press, 2020) 164.

74. See e.g. Simon Klopschinski, Christopher Gibson & Henning Grosse Ruse-Khan, *The Protection of Intellectual Property Rights Under International Investment Law* (Oxford: Oxford University Press, 2020). A special issue of Transnational Dispute Management was devoted to this subject in 2009 (2009 TDM).

d. *Investment*

As noted above, the international investment regime followed a distinct trajectory from the trade regime. Instead of being dealt with primarily by multilateral rules, like the WTO agreements, investment is governed by a dense network of mostly bilateral treaties. This "separation at birth" of the trade and investment treaty regimes, however, does not correspond with economic reality. In business practice, investment and trade are intimately linked in manifold ways.[75] For example, as the discussion of vertical investment above shows, trade rules affect business decisions about where to invest and investment decisions affect how trade occurs. Nevertheless, while the trade and investment relationship, including the impact of trade and investment rules, have been studied closely by economists for a long time, integrated disciplines have developed in international treaties in only a limited way.[76]

Beginning in the 1990s, some attention has been paid to investment in trade agreements. The WTO addresses investment through rules on trade in services delivered through a commercial presence as well as its *Agreement on Trade-related Investment Measures* (*TRIMs Agreement*).[77] But *GATS* commitments require little or no liberalization for most WTO Members and the *TRIMs Agreement* has a very narrow focus.[78] Essentially *TRIMs* provides that measures directed at investment but impacting trade in goods must be consistent with WTO rules on trade in goods. For example, if a state had a rule that a foreign manufacturer could only enter its jurisdiction if the manufacturer agreed to source all the goods needed to run its manufacturing operation in that state, the rule would create a preference for the state's goods over foreign substitutes. This kind of discrimination is contrary to the WTO national treatment obligation.[79]

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75. Tomer Broude, "Investment and Trade: the 'Lottie and Lisa' of International Economic Law?" in Roberto Echandi & Pierre Sauvé, eds, *Prospects for International Investment Law and Policy* (Cambridge, UK: Cambridge University Press, 2013) 139. Broude uses the expression "separated at birth" (at 140).

76. See e.g. Raymond Vernon, "International Investment and International Trade in the Product Cycle" (1966) 80:2 Q J Economics 190. A more recent example is OECD-WTO-UNCTAD, *Implications of Global Value Chains for Trade, Investment, Development and Jobs* (Geneva: WTO, 2013).

77. *Agreement on Trade-Related Investment Measures* (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186 (entered into force 1 January 1995).

78. VanDuzer, "Services," *supra* note 58.

79. GATT, *supra* note 2, art III. In a case brought by the US under the *GATT*, the panel concluded that Canada violated *GATT* art III.4 by imposing such a condition on approval of an investment. See *Canada – Administration of the Foreign Investment Review Act (Complaint by the United States)* (1983), GATT Doc L/5504 – 30S/140, 30th Supp BISD (1982-1983) 140.

Beginning with *NAFTA* in 1994, an increasing number of comprehensive trade treaties incorporated provisions for investor protection and investor-state arbitration.[80] Typically, however, trade treaties simply reproduce BIT rules in stand-alone chapters rather than creating integrated trade and investment disciplines. A few investment treaties have limited provisions addressing trade. For example, most Canadian treaties prohibit the imposition of performance requirements like those prohibited by the *TRIMs Agreement*.[81]

In the past few years, some legal scholars have begun to investigate the relationship of trade and investment rules. Some early writing simply grouped separate discussions of trade and investment rules in a single work.[82] More recently, academics have sought to identify areas of commonality and difference at the level of principle, treaty provisions, culture, and dispute settlement.[83] Some have advocated for a more integrated approach enabling insights and understanding in one area to inform the other.[84] Others have gone further to argue for an integrated approach to treaty design.[85]

e. *The environment, labour rights, human rights, Indigenous rights, development, and other policy priorities*

IEL rules limit states' ability to act in ways that impede trade and prejudice investors. Inevitably, they will clash with domestic law rules addressing

80. *NAFTA*, *supra* note 45, essentially incorporated the US model bilateral investment treaty in its Chapter 11 (Céline Lévesque & Andrew Newcombe, "Canada" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 53).

81. See e.g. "2021 Model FIPA" (last visited 25 May 2021), art 12, online: *Global Affairs Canada* <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng#article-12> [perma.cc/RCS5-92GK]. The prohibition in art 12 is broader than the *TRIMS Agreement* prohibition.

82. E.g. Robert K Paterson et al, eds, *International Trade and Investment Law in Canada*, 2nd ed, (Toronto: Carswell, 1994).

83. One of the first comprehensive analyses was Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge, UK: Cambridge University Press, 2016). See also Andrew D Mitchell & Elizabeth Sheargold, *Principles of International Trade and Investment Law* (Cheltenham: Elgar, 2021). Some works look at a particular aspect of the interface between trade and investment rules. See e.g. Rafel Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Alphen aan den Rijn: Wolters Kluwer, 2021); Nicolas DiMascio & Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 AJIL 48; Elizabeth Whitsitt & Todd Weiler, "WTO Dispute Settlement, Investor-State Arbitration and Investment Courts: Exploring Themes of State Power, Adjudication and Legitimacy" (2019) 13:2 Dispute Resolution Intl 1.

84. Kurtz, *supra* note 83 at 279-281; Mitchell & Sheargold, *supra* note 83 at 214-218.

85. See e.g. Broude, *supra* note 75. Others are skeptical about the desirability and feasibility of such integration (see e.g. Christian Tietje, "Perspectives on the Interaction Between International Trade and Investment Regulation" in Echandi & Sauvé, *supra* note 75 at 166).

other policy priorities.[86] For example, when a foreign investor opens a mine, it will significantly affect the local environment and could displace traditional users of the land and impact health in the local community. IEL rules that protect the investor could limit the host state's ability to regulate to protect local interests when doing so would interfere with the investor's operations. Imposing costly new pollution abatement requirements, for example, might violate investor protection commitments. The need for IEL rules to accommodate other considerations has grown as IEL rules have become more comprehensive and pervasive over time.[87] For example, as tariff barriers have been reduced, trade treaties have increasingly focused on non-tariff barriers, such as those embedded in national product and health standards.[88] With the addition of international trade and investment disciplines in new areas, like services and intellectual property, the prospects for conflict with domestic and international rules in other policy areas have multiplied. A key challenge is to ensure that IEL rules do not inappropriately constrain state sovereignty to address other policy priorities. For example, IEL product standard rules must balance disciplining domestic measures that restrict trade with states' freedom to regulate to protect health.

Exploring the ways in which IEL rules interact with international law rules in other areas and impact domestic policy-making has been an increasing focus of IEL scholarship beginning in the 1990s.[89] French suggested recently that there had been a shift from considering how the environment and other issues were linked to trade to considering them as core trade issues.[90] In the remainder of this section, some particular aspects of IEL scholarship on the interaction between trade and investment rules and other policy areas are discussed.

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86. John H Jackson, "Reflections on International Economic Law" (1995–1996) 17:1 U Pa J Intl L 17 at 24-25 [Jackson, "Reflections"].

87. McRae, *supra* note 4 at 212. See also Cottier, *supra* note 9 at 13 (Cottier notes that the problems we face are typically interdependent in practice and not easily addressed with rules narrowly designed to promote trade or protect investors).

88. Trachtman, "Revolution," *supra* note 9 at 51.

89. *Ibid* (Trachtman cites *United States—Restrictions on Imports of Tuna (Complaint by Mexico)*, GATT Doc DS21/R, 39th Supp BISD 155 (1992) 155 as the first trade and environment conflict). Charnovitz noted in 2009 that over 25 previous years a very substantial literature has developed regarding how norms in other areas do or should affect trade law, though much less on how trade law affects other areas (Charnovitz, "What is IEL?," *supra* note 1 at 20). One early example is Maury E Bredahl et al, eds, *Agriculture, Trade & the Environment: Discovering and Measuring the Critical Linkages* (Boulder: Westview Press, 1996). A more current example is Rafael-Arcas, "Green Bills for Green Earth: How the International Trade and Climate Regimes Work Together to Save the Planet" (2022) 31:1 European Energy & Environmental L Rev 19.

90. Duncan French, "Personal Opinion: Studying (and Teaching) International Economic Law to Undergraduates" (2013) 10:2 Manchester J Intl Econ L 125 at 125.

International law has rules to address conflicts between trade and investment treaty rules and other rules of international law. Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* requires treaties to be interpreted to "take into account any relevant rules of international law applicable in the relations between the parties."[91] How this so-called "anti-fragmentation provision" should apply and critiques of its application by international trade and investment tribunals as well as broader questions regarding how IEL has affected other areas of international law and vice-versa, especially as evidenced in dispute settlement cases, are all issues that have been addressed extensively in the scholarly literature.[92]

International economic law instruments contain various provisions that more directly manage the interaction between IEL rules and other international law rules as well as domestic measures in other policy areas.[93] One common approach in trade treaties is to include express limitations on the application of treaty rules to other policy areas, such as through exceptions for measures in those areas. The *GATT*, for example, permits measures otherwise inconsistent with obligations in the treaty that are "necessary to protect human, animal or plant life or health."[94] Some trade treaties permit party states to take reservations excluding particular state measures, sectors, policy tools (like subsidies), or even whole areas of policy-making from the application of treaty prohibitions.[95] Historically, most investment treaties did not include exceptions or reservations regarding other policy goals, though this has started to change.[96]

Both exceptions and reservations have been long-standing features of Canadian trade and investment treaties.[97] Beginning in the late 1990s, the use of exceptions and reservations became more widespread and additional approaches were adopted.[98] New provisions, initially regarding

91. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

92. See e.g. McRae, *supra* note 4 at 91-192; Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Oxford: Hart, 2016) at 210-244.

93. Dafina Atanasova, "Non-Economic Disciplines Still Take a Back Seat: The Tale of Conflict Clauses in Investment Treaties" (2021) 34:1 Leiden J Intl L 155 (Atanasova creates a typology of treaty clauses used to manage conflicts between investment treaty obligations and other treaty obligations, surveys their prevalence, and analyzes their effects).

94. GATT, *supra* note 2, art XX.

95. See e.g. *NAFTA*, *supra* note 45, arts 1108, 1206.

96. J Anthony VanDuzer, "Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?" in Markus Krajewski & Steffen Hindelang, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Cambridge, UK: Cambridge University Press, 2016) 142.

97. *Ibid*.

98. Amelia Keene, "The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements" (2017) 18:1 J World Investment & Trade 62; Andrew

labour rights and environmental protection, but increasingly embracing a wider range of social concerns, like sustainable development, corporate social responsibility, human rights, Indigenous rights, corruption, gender, and diversity, have been introduced into some new trade and investment treaties.[99] Some of these provisions go beyond seeking to minimize the risk that trade and investment treaties will impair the ability of states to adopt policies in these areas and seek to promote progressive improvement. For example, some new provisions seek to ensure the effectiveness of domestic laws in areas, like labour and the environment, and include commitments to comply with identified standards, sometimes by reference to international instruments, such as International Labour Organization agreements, and backed up by dispute settlement mechanisms.[100]

Exploring the relationship between trade and investment rules and other policy considerations, has often brought together scholars who have traditionally focused on IEL and those engaged on other issues.[101] Concerns regarding the impact of trade and, especially, investment rules as applied by investor-state arbitration tribunals on states' freedom to regulate and skepticism regarding the effectiveness of traditional approaches to managing conflict between IEL rules and other policy priorities form the basis for a substantial body of academic analysis and critique.[102] Some reform proposals from academics and civil society organizations have

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Newcombe, "General Exceptions in International Investment Agreements" in Marie-Claire Cordonier Segger, Markus Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer, 2011) 351.

99. UNCTAD, *International Investment Treaties 1998-2006* (New York: United Nations, 2007) at 92; International Labour Organization, *Social Dimensions of Free Trade Agreements* (Geneva: International Labour Organization, 2013) at 19-20; Kathryn Gordon & Joachim Pohl, "Environmental Concerns in International Investment Agreements: A Survey" (2011) OECD International Investment Working Paper No 2011/01; Borrows & Schwartz, *supra* note 73; Ljiljana Biukovic & Pitman B Potter, eds, *Local Engagement with International Economic Law and Human Rights* (Cheltenham: Elgar, 2017).

100. Lorand Bartels, "Human Rights and Sustainable Development Obligations in the EU's Free Trade Agreements" (2013) 40:4 LIEI 297; Lorand Bartels, "Social Issues: Labour, Environment and Human Rights" in Simon Lester & Bryan Mercurio, eds, *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge, UK: Cambridge University Press, 2009) 342; OECD, "International Investment Agreements: a Survey of Environmental, Labour, and Anti-Corruption Issues" in *International Investment Law: Understanding Concepts and Tracking Innovations* (Pari: OECD, 2008) 135.

101. See e.g. Borrows & Schwartz, *supra* note 73; Ibironke Odumosu-Ayanu "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework" (2014) 15:2 Melbourne J Intl L 473.

102. See e.g. Wolfgang Alschner & Kun Hui, "Missing in Action: General Public Policy Exceptions in Investment Treaties" in Lisa Sachs, Lise Johnson & Jesse Coleman, eds, *Yearbook on International Investment Law and Policy 2018* (New York: Oxford University Press, 2018) c 21; Atanasova, *supra* note 93.

contributed to significant developments in recent trade and investment treaties.[103]

f. *Dispute settlement*

i. *Introduction*

International economic law dispute settlement procedures are the most powerful, effective, and widely used mechanisms to deal with disputes in international law. By far the most important of these are state-to-state dispute settlement at the WTO and investor-state arbitration under investment treaties. Each is the subject of a deep but distinct literature.

ii. *WTO dispute settlement*

By 1970, academic analysis of dispute settlement under the *GATT*, the predecessor to the WTO, was well established.[104] Academic writing by *GATT* scholars influenced what became the WTO dispute settlement system in 1995.[105] WTO dispute settlement has been actively used, with more than 600 complaints filed between 1995 and 2021.[106] The process and the cases are intensively studied and discussed.[107] The failure to date of negotiations for substantive WTO reform has encouraged resort to dispute settlement as the only way to address issues regarding the application of WTO rules. Several features of the process have also encouraged its use, including its compulsory nature, the possibility for countries to join together to bring complaints, the essentially binding character of decisions, and a well-developed process to encourage members to bring their regimes into compliance with their obligations.[108] Most other international law dispute

103. E.g. the IISD Model Agreement on Investment inspired new thinking about what should be included in investment treaties among academics and governments: Howard Mann et al, *IISD Model Agreement on Investment for Sustainable Development* (Winnipeg: International Institute for Sustainable Development, 2005).

104. See e.g. Jackson, *Law of the GATT*, *supra* note 2; Robert E Hudec, *Enforcing International Trade Law* (Salem, NH: Butterworth Legal Publishers, 1993) [Hudec, *Enforcing*] (Hudec described the dispute settlement system as the "jewel of the GATT legal system" at 9).

105. See e.g. John H Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relations Press, 1990) at 49-54.

106. "Current status of disputes" (last visited 15 May 2022), online: *WTO* <wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm> [perma.cc/2EJD-SFX2]. There is no authoritative figure for the total number of dispute settlement cases under other trade agreements.

107. See e.g. Petros C Mavroidis, *The WTO Dispute Settlement System: How, Why and Where* (Cheltenham: Elgar, 2022); Sivan Shlomo Agon, *International Adjudication on Trial: The Effectives of the WTO Dispute Settlement System* (Oxford: Oxford University Press, 2019). One example of a book-length analysis of WTO decisions is Wenwei Guan, *WTO Jurisprudence: Governments, Private Rights, and International Trade* (New York: Routledge, 2020).

108. *DSU*, *supra* note 37, art 4.7 (right to request panel), art 6 (establishment of panels), art 9 (multiple complainants), art 10 (third parties), art 16 (adoption of panel reports), art 17 (appellate body), art 21 (surveillance of implementation of recommendations and rulings), art 22 (compensation

settlement systems lack most or all these features. The relative effectiveness of the WTO process has drawn critical attention from scholars working in other areas, like environmental protection and health, who are concerned that non-trade policy initiatives risk being found incompatible with trade rules.[109]

The WTO system has ceased to function effectively. Based on concerns over Appellate Body decision-making, the US has refused to agree to the nomination of Appellate Body members as their terms expired.[110] By December 2019, there were not enough Appellate Body members to hear appeals. Without a functioning Appellate Body, WTO members can appeal a panel report "into the void" preventing a final determination of the dispute and practically undermining WTO members' ability to use the dispute settlement process to seek compliance with WTO obligations.

As a heavily trade-dependent country, Canada relies on international rules to secure access to markets for its goods and services and has been a strong supporter of effective dispute settlement mechanisms to encourage compliance with those rules. Canada actively participates in WTO dispute settlement, initiating 40 disputes as a complainant since 1994. Canada has also been the respondent in 23 disputes. Canadian diplomats and academics played a leading role in the creation of the WTO dispute settlement system.[111] Canadians have been among the leading academic commentators on the system as well as frequent WTO panelists.[112] Dispute settlement proceedings under other Canadian treaties have been less common. Only three state-to-state cases were completed under *NAFTA* while it was in force from 1994 to 2020.[113]

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and suspension of concessions). On the advantages of WTO dispute settlement, see Rafael Leal-Arcas, "Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding" (2011) 19:5 Transnational Dispute Management J; Arie Reich, "The Effectiveness of the WTO Dispute Settlement System: a Statistical Analysis" (2017) EUI Working Paper No Law 2017/11 at 18 (Reich found that eighty per cent of WTO decisions were complied with). See similarly, Marc Busch & Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24:1 Fordham Intl LJ 158.

109. See e.g. Steve Charnovitz, "Environment and Health under WTO Dispute Settlement" (1998) 32:3 Intl Lawyer 901. Concerns about the threat of WTO rules to the environment and labour rights caused demonstrations at the Seattle Ministerial Conference of WTO Members in 1999 (Charnovitz, "What is IEL?," *supra* note 1 at 21).

110. William A Kerr, "Dispute Settlement—Or Not?" (2021) 22:1 Estey J Intl L & Trade Policy 1.

111. Richard Ouellet, "Le rôle du Canada dans l'évolution institutionnelle et substantive du système GATT/OMC" in Fitzgerald et al, *supra* note 6, 191 at 204-205; Valerie Hughes, "Canada: A Key Player in WTO Dispute Settlement" in Fitzgerald et al, *supra* note 6 at 207.

112. Hughes, *supra* note 111 at 226 (in 2018, Valerie Hughes noted that 22 Canadians had been WTO panellists, more than any other nationality).

113. See David Gantz, "Government to Government Dispute Resolution under NAFTA Chapter 20: A Commentary on the Process" (2000) 11:4 Am Rev Intl Arb 481.

iii. *Investor-state arbitration*

Though almost 100 BITs were already in place by 1970, few investor-state arbitration cases were filed prior to the mid-1990s. By the end of 2021, however, almost 1,200 cases had been commenced. The highest annual number of cases filed was 140 in 2018. Out of the 807 concluded cases, 229 (twenty-eight per cent) of final awards favoured investors.[114] The money at stake in these cases is often significant. The average amount claimed is US$1.5 billion and the average amount awarded is US$438 million.[115] Several awards have exceeded US$1 billion.[116] In addition to awards, interest, and legal costs can be substantial.[117]

As with the WTO, one of the reasons for frequent resort to investor-state arbitration is its effectiveness. Indeed, investor-state arbitration is even more effective as a mechanism for the enforcement of treaty rights for the direct benefit of investors. Unlike WTO dispute settlement, investors have the right to claim damages on the basis that a state has breached its treaty obligations causing loss to the investor. Investors have full control over how to pursue their claims, including whether to settle. Awards of damages are readily enforceable worldwide in domestic courts under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* or the *International Convention on the Settlement of Investment Disputes*, where the arbitration takes place under that convention.[118]

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114. "Investment Dispute Settlement Navigator" (last visited 15 May 2022), online: *UNCTAD* <investmentpolicy.unctad.org/investment-dispute-settlement> [perma.cc/7D9H-YL47] [UNCTAD, "ISDS Navigator"].

115. Matthew Hodgson, Yarik Kryvoi & Daniel Hrcka*, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (London: BIICL & Allen & Overy, 2021) at 5.

116. See e.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador – Reward* (2012) (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier, David AR Williams, Brigitte Stern), online (pdf): *Italaw* <www.italaw.com/sites/default/files/case-documents/italaw1094.pdf> [perma.cc/L276-A9CB](awarded US $1.7 billion).

117. David Gaukrodger & Katharine Gordon, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment, No 2012/3 (according to this study, "legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases" (at 19)).

118. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959). There are currently 170 parties (UNCITRAL, "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (last visited 25 May 2022), online: <uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> [perma.cc/GC9M-JZQH]; *International Convention on the Settlement of Investment Disputes,* 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966). There are currently 156 parties (ICSID, "List of Member States – ICSID/3" (last visited 15 May 2022), online: <icsid.worldbank.org/resources/lists/icsid-3> [perma.cc/CQA9-J95X]. The convention provides the most commonly used procedure for investor-state arbitration. Article 54 of the convention requires party states to enforce awards made under the convention as if they were awards of domestic courts.

Canada has been actively involved in investment arbitration. Thirty-one cases have been filed against Canada, all but one by US investors under NAFTA.[119] Canada has paid out approximately C$263 million in damages and settlements.[120] Canadian foreign investors have filed more than 60 claims against other countries under NAFTA and other Canadian treaties with investment provisions.[121]

The prodigious output of investor-state arbitration has meant that investment arbitration awards are a dynamic source of investment law as well as general international law, in areas like treaty interpretation, treaty interaction, state responsibility, remedies for breach of international law, the development of customary international law, and countermeasures.[122]

Investor-state arbitration has triggered strong criticism from states, civil society organizations, and academics. Investor-state arbitration was originally introduced in investment treaties by developed countries to address concerns that their investors would not be able to get relief against state actions in the domestic courts of developing countries. Investor-state arbitration was expected to provide fast and cheap relief in a de-politicized forum.[123] In practice, investor-state cases have proved to be lengthy and costly.[124] Concerns have also been raised about arbitrator independence and quality as well as transparency and other aspects of the investor-state arbitration process.[125] Most important, arbitral tribunal decisions have been inconsistent, even incoherent, impairing the predictability of investor protection obligations for host states, and sometimes inappropriately providing relief from legitimate state regulation.[126] The combination of unpredictable standards and the risk of costly arbitration has been criticized as leading to "regulatory chill," a situation in which countries refrain from regulating foreign investors for fear of triggering investor-state claims.[127]

As a result of all these concerns and others, investor-state arbitration is in a legitimacy crisis and a deep literature has developed both critiquing

119. UNCTAD, "ISDS Navigator," *supra* note 114.
120. Scott Sinclair, *The Rise and Demise of NAFTA Chapter 11* (Ottawa: Canadian Centre for Policy Alternatives, 2021) at 10.
121. UNCTAD, "ISDS Navigator," *supra* note 114.
122. Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57:2 ICLQ 361.
123. UNCTAD, *Investor-State Dispute Settlement: A Sequel* (Geneva: United Nations, 2014) at 13.
124. Gaukrodger & Gordon, *supra* note 117 at 19.
125. See e.g. Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50:1 Osgoode Hall LJ 211 [Van Harten, "Arbitrator Behaviour"]; Gaukrodger & Gordon, *supra* note 117 at 45ff.
126. Gaukrodger & Gordon, *supra* note 117 at 58ff.
127. Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018) 7:2 Transnational Environmental L 229.

and defending the process and proposing reforms.[128] In 2016, UNCITRAL tasked its Working Group III with making recommendations for reform of investor-state dispute settlement.[129] This body is considering a wide range of proposals. An "academic forum" of leading scholars has been established "to exchange views, explore issues and options, test ideas and solutions, and make a constructive contribution to the ongoing discussions on possible reform of ISDS, in particular, the discussions in the context of UNCITRAL's Working Group III."[130]

III. *International economic law evolves as a discipline*

1. *Introduction*

Over the last half-century, IEL has evolved in step with globalization to embrace new subjects. It has also developed as an academic discipline. Charting the trajectory of IEL as a discipline, however, is challenging in the absence of a clear and widely accepted definition of IEL. As noted at the outset, IEL can be broadly conceived as all the law, domestic and international, that governs international economic activity. The narrower conception adopted for the convenient purpose of limiting the scope of this survey fails to give a complete account of IEL as a discipline for several reasons discussed below. Nevertheless, much academic work continues to be fragmented into traditional silos, like trade and investment, without advertence to their connection to a broader discipline of IEL.

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128. One of the first commentators to conclude that a legitimacy crisis existed was Susan Franck (Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 Fordham L Rev 1521). Prominent Canadian critics include Van Harten (Gus Van Harten, *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020) and Schneiderman (David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008). One detailed reform proposal is Emma Aisbett et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018). See also Anthea Roberts, "Incremental, Systemic, and Paradigmatic Reform of Investor-state Arbitration" (2018) 112:3 American J Intl L 410; Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2012); Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (London: Routledge, 2012). A special issue of *The Law and Practice of International Courts and Tribunals* was devoted to reforming international investment arbitration. For an overview, see Chiara Giorgetti et al, "Reforming International Investment Arbitration: An Introduction" (2019) 18 L & Prac Intl Courts & Trib 303.

129. UNCITRAL, *Settlement of Commercial Disputes: Presentation of a Research Paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a Possible Model for Further Reforms of Investor-State Dispute Settlement: Note by the Secretariat* UN Doc No A/CN.9/890, June-July 2016.

130. "Academic Forum on ISDS" (last visited 25 June 2022), online: *University of Oslo* <jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> [perma.cc/3TRL-SE99]. The forum has produced research papers and two of its members are engaged in an analysis of the process itself: Anthea Roberts & Taylor St John, "Complex Designers and Emergent Design: Reforming the Investment Treaty System" (2022) 116:1 AJIL 96.

2. *The need for a broad conception of IEL*

International economic activity is governed in practice not just by international trade and investment law but also by other international rules directed at economic activity, like tax and monetary law, as well as international law in a wide range of other areas that affect economic activity even if that is not their main purpose, such as environmental law, human rights and labour law.[131] International law and states' responses to international law, including through domestic implementation and compliance with international rules in all these areas affect international economic activity. For example, domestic laws directly dealing with economic activity, like competition policy, tax laws, and sector-specific regulation, such as in financial services, will affect business decisions about where to locate and the prospects for trade.[132] Domestic laws governing international contracts and conflicts of laws as well as local rules in non-economic areas can have similar effects. As noted above, with the dramatic expansion and transformation of trade and investment activities through globalization, the impact of domestic policy-making on trade and investment activities has grown.

At the same time, international law and states responses to it increasingly affect domestic economic and social conditions. Domestic policy-makers must balance the effects of domestic measures on trade and investment with effects on other policy priorities. International rules that create a framework for domestic policy-making must be informed by an understanding of both international economic activity and the way that it interacts with domestic rules and interests in other policy areas. In particular, trade and investment rules must provide sufficient space for domestic regulation to achieve other policy goals, like human rights, sustainable development, and climate change mitigation and adaptation. The increasingly significant interlinkages between domestic and international law in relation to international economic activity and other policy goals suggest that the study of IEL needs to comprehend all of these areas if it is to be coherent and complete.[133]

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131. See e.g. Cottier, *supra* note 9. Cottier argues that international law relating to "sovereignty of natural resources, the law of the sea, environmental law, the law of human rights and the laws of war are all ultimately linked to economic interests and cannot be separated from economic law strictly speaking" (at 13).

132. The management discipline of "International Business" is substantially focused on determinants of investment decision-making. One leading text providing a synthesis of these determinants is John H Dunning and Sarianna M Lundan, *Multinational Enterprises in the Global Economy*, 2nd ed (Cheltenham: Elgar, 2008).

133. It is also essential to its normative legitimacy. See Ernst-Ulrich Petersmann, "The Future of International Economic Law: A Research Agenda" in Christian Joerges & Ernst-Ulrich Petersmann,

3. *The continuing fragmentation of IEL scholarship*

Recognizing the need for a comprehensive understanding of IEL, in the 1990s, a number of leading trade law scholars began calling for an approach to IEL that went beyond trade.[134] It is, perhaps, not surprising that trade scholars were the first to write about IEL as a discipline. *NAFTA*, the WTO, and other comprehensive trading arrangements address the interaction between trade and investment rules other policy areas, even though partially and imperfectly.

However, this call is only beginning to be answered. Most book-length treatments of IEL were written in the past 20 years and cover more than trade and investment. For example, Qureshi and Zeigler also cover international law related to taxation, labour movement and standards, international development, and monetary law.[135] Nevertheless, relatively few scholars working in discrete areas explicitly acknowledge how their work connects to something bigger called IEL, much less seek to integrate their work with that in other areas. Those working in economic areas of international law, like monetary law and international taxation, and even some investment specialists have typically not conceived of their work as part of IEL as a distinct discipline.[136] Indeed, it remains commonplace even for scholars working in trade to have little regard for work in the other areas, though, as noted above, some recent work seeks to break down the silos between trade and investment. Other areas of international economic policy are typically given scant attention from those working in trade and investment. For example, the comparative study of domestic regulation and its effects on international trade and investment is little addressed by trade and investment law scholars.[137] Academic writing in private law

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eds, *Constitutionalism, Multilevel Trade Governance and International Economic Law,* 2nd ed (Oxford: Hart, 2011) 533 [Petersmann, "The Future"].

134. Jackson, "Boilerroom," *supra* note 10; Cottier, *supra* note 9; Trachtman, "Revolution," *supra* note 9; Charnovitz, "What is IEL?," *supra* note 1.

135. Qureshi & Zeigler, *supra* note 11. Andreas Lowenfeld, *International Economic Law*, 2nd ed (Oxford: Oxford University Press, 2008) (in the second edition of his book on IEL, Lowenfeld added the environment, competition law, intellectual property, and international institutions to the subjects covered in the first edition: international trade, investment, monetary law, and economic sanctions rules).

136. There are some exceptions. In relation to tax for example, see Wolfgang Alschner, "Shifting Design Paradigms: Why Tomorrow's International Economic Law May Look More Like the Tax Regime than the WTO" (2020) 114 AJIL Unbound 270. In relation to monetary law, see Thomas Cottier et al, eds, *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge, UK: Cambridge University Press, 2014).

137. One exception is Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013). Bjorklund & Nappert advocate an "inter-nuclei communication model" to deal with fragmentation in which decision-makers in one area, like investment arbitration, take guidance from

areas, like international contract law, conflicts of laws, and commercial arbitration, typically ignores other areas of IEL and, in turn, is ignored by IEL scholars working in other areas.[138]

The attention of scholars concerned about the impact of trade and especially investment law on the capacity of states to regulate to achieve other policy priorities, like environmental protection and human rights, is one exception to this fragmentation.[139] As well, many scholars focused on international development have addressed traditional core IEL subjects like trade, investment, taxation, and monetary law and policy.[140]

One other area in which IEL scholars, again mostly trade specialists, have tackled the challenge of fragmentation is the place of IEL in international law generally. International economic law scholars have argued strongly that IEL "can not be separated or compartmentalized from general or 'public' international law…[and] general international law has considerable relevance to economic relations and transactions."[141] For example, general international law rules regarding treaties, state responsibility and, in the case of investor-state cases, customary international law rules regarding investor protection have all been recognized and applied in IEL adjudication.[142] Indeed, trade and investment adjudication has become the most important site for the contestation and development of these rules.[143] International lawyers began to pay some attention to trade and investment law in the 1960s.[144] Nevertheless, in 1998, McRae wrote that IEL was still not considered an essential part of international law by

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decisions in other areas: Andrea K Bjorklund & Sophie Nappert, "Beyond Fragmentation" in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Leiden: Martinus Nijhoff, 2011) 439 at 445ff.

138. See e.g. Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed (Markham: LexisNexis, 2005) (loose-leaf release 95).

139. This fragmented study of IEL tends to be mirrored in the way in which it is taught. Law schools often have separate courses on trade law, investment law, and international commercial arbitration, as well as a course on international business transactions which deals with private law issues. See Trachtman, "Revolution," *supra* note 9 at 39, 44.

140. See e.g. Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions, Studies in International Trade Law* (Oxford: Hart, 2012); Emmanuelle Jouannet, *What Is a Fair International Society? International Law between Development and Recognition* (Oxford: Hart, 2013). See also *infra* note 201 and accompanying text on Third World Approaches to International Law (TWAIL).

141. Jackson, "Reflections," *supra* note 86 at 18. See similarly McRae, *supra* note 4 at 121.

142. Regarding WTO dispute settlement, see Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go" (2001) 95:3 AJIL 535. Regarding investment dispute settlement, see e.g. McLachlan, *supra* note 122; Atanasova, *supra* note 93 at 156-160 (dealing with other international law norms).

143. Trachtman, "Revolution," *supra* note 9 at 36 (Trachtman characterizes WTO dispute settlement as the leading source of international law).

144. McRae, *supra* note 4 at 113.

most international law scholars because it was not about the protection of basic human values and morals, but rather a "lesser" form of international law grounded in liberal economic ideology.[145] Instead of being primarily concerned about the actions of states in relation to each other and the preservation of peace and security, trade law is concerned with promoting economic welfare through private exchange.[146]

Perhaps because of its distinctive character, IEL continues to be viewed as somewhat apart from international law generally. In 2013, French noted that undergraduate students can complete studies in international law without learning about IEL.[147] He suggested that there was continuing paradox between IEL's importance in real life and its profile in university courses.

4. *Evidence of IEL as a mature discipline*

Beginning in the late 1990s, increasing evidence of IEL as a distinct discipline began to appear, including the establishment of specialized journals focused on IEL and academic organizations devoted to the subject. In general, these initiatives target IEL broadly conceived, but, in practice, the focus is largely on trade and investment law. One of the first journals devoted expressly to IEL was the *University of Pennsylvania Journal of International Economic Law*. In 1996, the *University of Pennsylvania Journal of International Business Law* adopted this name and a broad conception if IEL as its publishing mandate.[148] The leading IEL journal, the *Journal of International Economic Law*, was founded by trade scholar John Jackson, an advocate of a broad conception of IEL, in 1998. Jackson also played a role in the establishment of the International Economic Law Interest Group of the American Society of International Law, which held its first meeting in 1992.[149] Its biennial meetings are among the most

145. McRae, *supra* note 4 at 115, 136-137; Trachtman, "Revolution," *supra* note 9 at 48 (Trachtman captures the same sentiment using the words "low politics" of international trade compared to the "high politics" of other aspects of international law); Stephen Zamora, "International Economic Law" (1996) 17:1 U Pa J Intl L 63 (in 1995, Zamora described IEL as "still striving towards increased recognition and definition" at 63).

146. McRae, *supra* note 4 at 117, 123. See similarly Trachtman, "Revolution," *supra* note 9 at 41-42.

147. French, *supra* note 90 at 125.

148. A note to the first edition defined IEL broadly for the purposes of the journal as "as a multi-disciplinary approach that includes but is not limited to: (1) private international transactions, (2) national governmental regulation, and (3) international intergovernmental regulation" ("Editors' Note" (1996) 17:1 U Pa J Intl Econ L 1 at 1). The Note also refers to an "interdisciplinary and comparative focus" (at 1).

149. Joel Trachtman, "John Jackson and the Founding of the World Trade Organization: Empiricism, Theory and Institutional Imagination" (1999) 20:2 Mich J Intl L 175 at 176 [Trachtman, "Jackson"]. Jackson also founded the Institute for International Economic Law at Georgetown University in 1999. The Institute now focuses on "trade policy, international tax, monetary affairs, fintech and financial

important IEL meetings worldwide.[150] Based on these initiatives and others, some recognize Professor Jackson as one of the greatest contributors to the development of IEL as a discipline.[151]

The globally leading organization for IEL scholars, the Society of International Economic Law (SIEL), was founded in Geneva in 2008. Its biennial gatherings are the leading fora for the discussion of IEL.[152] At its inaugural conference, it sought to "explore the many different faces of 'international economic law' in order to reflect critically on its past, present and future paths."[153] The main focus of the conference presentations, however, was limited to international trade and investment law with some discussion of development, environmental protection, financial regulation, labour, migration, and human rights.

Canada has no journal expressly dedicated to IEL, though two focus on many of its aspects. The *Estey Journal of International Law and Trade Policy* was founded in 2000 by the Estey Centre for Law and Economics in International Trade at the University of Saskatoon. Its mandate extends to "any aspect of international law, trade policy or other areas of international relations that pertain directly to the international commercial or legal environment" but, in practice, it has tended to be a focus on trade, especially agricultural trade.[154] The *Asper Review of International Business and Trade*

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regulation" as interrelated fields ("Institute of International Economic Law" (last visited 25 May 2022), online: *IIEL* <law.georgetown.edu/iiel/> [perma.cc/94PQ-3ASK].

150. Isabelle Bunn & Colin Picker, "The State and Future of International Economic Law" in *International Economic Law: The State and Future of the Discipline* (Oxford: Hart, 2008) 1 at 3, n 2.

151. E.g. Charnovitz, "What is IEL?," *supra* note 1. Charnovitz called Jackson the "greatest champion" of the concept of IEL, at 18. See also Trachtman, "Revolution" *supra* note 9 at 48, calling Jackson a leading scholar and practitioner of IEL and Trachtman, "Jackson" *supra* note 149, suggesting that Jackson "established the field of international economic law" at 176 . The *Manchester Journal of International Economic Law* started publishing in 2004. According to its founder, the journal would focus on "the full ambit of international economic relations" (Asif Qureshi, "Communications Flows in International Economic Law" (2004) 1:1 Manchester J Intl Economic L 2 at 3). The SSRN e-journal, International Economic Law, started in 1996. The European-based Revue Internationale de Droit Economique was established in 1987. WorldTradeLaw.net began publishing its International Economic Law and Policy Blog in 2006 ("About" (last visited 25 May 2022), online: *International Economic Law and Policy Blog* <ielp.worldtradelaw.net/about.html> [perma.cc/28YY-PA2J]). It focuses on trade and investment.

152. Charnovitz, "What is IEL?," *supra* note 1 at 20. See "Society of International Economic Law" (last visited 25 May 2022), online: *SIEL* <sielnet.org/> [perma.cc/7N9V-S46Q]. The origins of SIEL can be traced to the ASIL International Law Interest Group meeting in 2006. See Bunn & Picker, *supra* note 150 at 10.

153. "SIEL 2008 Inaugural Conference" (last visited 25 May 2022), online: *SIEL* <sielnet.org/conferences/siel2008/> [perma.cc/2W9Z-VEVG].

154. "Estey Journal of International Law and Trade Policy" (last visited 25 May 2022), online: *University of Saskatchewan College of Law* <law.usask.ca/research/publications/estey-journal-of-international-law-and-trade-policy.php> [perma.cc/FG5U-K2UD].

Law was started by Bryan Schwartz in 2001. It has a very broad focus on international and domestic laws related to international business.[155]

Specialized courses on IEL subjects have become common at law schools in Canada and elsewhere, with almost all schools offering at least one.[156] The Schulich School of Law at Dalhousie University, and the faculties of law at Queen's University and the University of Ottawa offer courses on IEL as a distinct subject. The University of Ottawa is the only school that offers a specialized graduate program: an LLM in International Trade and Foreign Investment Law.[157]

IEL scholarship has never been confined to the academy. Experts at international organizations, like the WTO, UNCTAD, the World Bank, and the OECD have made major contributions as have those at a diverse range of NGOs and think tanks. Leading Canadian examples are the International Institute for Sustainable Development, the Canadian Centre for Policy Alternatives, the Institute for Research in Public Policy, and the CD Howe Institute. Government officials and private sector practitioners in Canada and around the world have also been actively engaged in writing on trade and investment policy.[158] At the same time, many academics have participated in IEL formation as members of or counsel before dispute settlement panels and as government negotiators of IEL treaties.

The development of specialized journals, academic organizations, and courses leaves little doubt that IEL has emerged as a distinct discipline, with many of its practitioners focused on international trade and investment law.[159] Nevertheless, it remains hard to define its boundaries and most working on IEL, broadly conceived, including many trade and investment law scholars, do not acknowledge that their work is part of a discipline

155. "Asper Review of International Business and Trade Law" (last visited 25 May 2022), online: *Asper Chair in International Business and Trade Law* <asperchair.bryan-schwartz.com/asper-review-of-international-business-and-trade-law/> [perma.cc/Z8Y9-PD72].

156. Teachers of IEL at Canadian law schools currently include Olabisi Akinkugbe, Wolfgang Alschner, Ljiljana Biukovic, Andrea Bjorklund, Chios Carmody, Charles-Emmanuelle Côté, Armand de Mestral, Patrick Dumberry, Heather Heavin, Nicolas Lamp, Celine Levesque, Andrew Newcombe, Ibronke Odusmosu-Ayana, Richard Ouellet, Maria Panezi, Robert Paterson, Linda Rief, Bryan Schwartz, Gus Van Harten, David Schneiderman, Bryan Schwartz, and Liz Whitsitt (compiled by author).

157. "Master of Laws Concentration in International Trade and Foreign Investment Law" (last visited 25 May 2022), online: *uOttawa* <www2.uottawa.ca/faculty-law/llmphd/programs/master-law-concentration-international-trade-foreign-investment> [perma.cc/T8LM-K274].

158. Canadian government officials who have written on trade and investment, include Rambod Behboodi, Dan Ciuriak, Jonathan Fried, Michael Hart, Valerie Hughes, Robert MacDougall, and John Weekes to name only a few. Practitioners are too numerous to list.

159. See Fried, *supra* note 6. In 2018, a top Canadian trade official, Jonathan Fried, wrote that "Canada's increasing engagement in international trade…elevated the field of economic and trade law to a specialized discipline in this country" (at 185).

called "IEL," much less seek to address how it connects to work in other IEL areas.

IV. *Trends in IEL Scholarship*

The nature of IEL scholarship has changed over the last 50 years. Traditional legal doctrinal scholarship analyzing international trade and investment treaty provisions and decisions interpreting them continues to dominate the field, but increasingly legal scholars are thinking about IEL obligations in a broader policy context, and using a variety of theoretical, interdisciplinary, and empirical approaches. This section briefly identifies some of the major trends.

1. *Interdisciplinary approaches*

Advocates for the development of IEL as a discipline have consistently argued in favour of engagement with other disciplines.[160] Beginning in the 1990s and accelerating thereafter, collaboration by lawyers with economists and political scientists has become increasingly common. The growing importance of IEL as part of the governance of the global economy encouraged other disciplines to study IEL.[161] At the same time, IEL scholars sought to use other disciplinary methods to test and enrich their work.[162] The wide variety of work precludes a complete discussion here, but a few highlights are noted.[163]

Traditionally, writing on international trade law has gone beyond doctrinal analysis to locate trade law in the context of economic theory, especially the theory of comparative advantage that is the primary justification for trade liberalization.[164] In some cases, economists and lawyers have worked together to analyze trade rules and the effects of WTO decisions.[165] Economists have used empirical techniques, most often regression analysis, to test theoretical predictions regarding the effects of

160. Jackson, "Reflections," *supra* note 86 at 19. Some work on IEL is multidisciplinary, meaning, for example, that the work of lawyers and those in other disciplines is gathered together in a research volume, as opposed to research being conducted in an integrated interdisciplinary way.

161. See Ari Van Assche, "From the Editor: Steering a Policy Turn in International Business—Opportunities and Challenges" (2018) 1:3-4 J Intl Business Policy 117 at 119 (Van Assche argued in favour of more attention to law and policy among economists working in the sub-discipline of International Business).

162. See e.g. Jonathan Bonnitcha, Lauge N Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017) integrating legal, economic, and political analysis.

163. For a more comprehensive overview, see Gregory Shaffer & Sergio Puig, "Interdisciplinarity and International Economic Law" in Thomas Cottier & Krista Nadakavukaren, eds, *Elgar Encyclopedia of International Economic Law*, 2nd ed (Cheltenham: Elgar) [forthcoming in 2022].

164. See e.g. Jackson, *Law of the GATT*, *supra* note 2.

165. See e.g. Petros Mavroidis & Henrik Horn, *American Law Institute (ALI) Reporters Studies on WTO Law*, cited in Shaffer & Puig, *supra* note 163.

trade rules, such as whether lowering trade costs through tariff reduction commitments leads to increased trade flows.[166] More recently, law and economics approaches have been used to understand and assess trade policy outcomes.[167]

Economic analysis does not have the same pedigree in investment law. International investment commitments do not benefit from theoretical support comparable to trade liberalization obligations. But, beginning in the late 1990s, lawyers began using law and economics analysis to explain why countries enter into investment treaties and to analyze other issues, like the requirements of substantive standards of investor protection and how compensation should be assessed.[168]

Political scientists, sometimes working with lawyers, have sought to understand and explain many different aspects of IEL, including negotiated trade and investment law outcomes, like *NAFTA*, the operation of international institutions, and the outcome of dispute settlement cases.[169] As well, some work has been done on how IEL rules and rule-making affect politics.[170]

Political science methods, including quantitative and qualitative methods, have been most commonly used to test theoretical explanations for legal outcomes related to trade. Political science research on trade

166. See e.g. Fabien Forge, Jason Garred & Kyae Lim Kwon, "When Are Tariff Cuts Not Enough? Heterogeneous Effects of Trade Preferences for the Least Developed Countries" (2022) University of Ottawa Department of Economics Working Paper No 2106E.

167. See e.g. Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade*, 4th ed (Abingdon: Routledge, 2012). Lawyers with an interest in development have considered trade and investment as an aspect of their work. See e.g. David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge, UK: Cambridge University Press, 2006). The editors describe "law and development" as a discipline at the intersection of law, economics, and institutions (at 4).

168. See e.g. Olivier De Schutter, Johan Swinnen & Jan Wouters, eds, *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Abingdon: Routledge, 2013); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge, UK: Cambridge University Press, 2014); Emma Aisbett & Jonathan Bonnitcha, "A Pareto-Improving Compensation Rule for Investment Treaties" (2021) 24:1 J Intl Econ L 181.

169. See e.g. Maxwell A Cameron & Brian W Tomlin, *The Making of NAFTA: How the Deal was Done* (Ithaca: Cornell University Press, 2000); Marc Busch & Krzysztof Pelc, "Ruling Not to Rule: The Use of Judicial Economy by WTO Panels" in Tomer Broude, Marc Busch & Amelia Porges, eds, *The Politics of International Economic Law* (Cambridge, UK: Cambridge University Press, 2011) 263; Gregory Shaffer, Manfred Elsig & Sergio Puig, "The Law and Politics of WTO Dispute Settlement" in Wayne Sandholtz & Christopher A Whytock, eds, *Research Handbook on the Politics of International Law* (Cheltenham: Elgar, 2017) 269.

170. See e.g. Jeffrey Frieden & Lisa Martin, "International Political Economy: Global and Domestic Interactions'" in Ira Katznelson & Helen V Milner, eds, *Political Science: The State of the Discipline* (New York: WW Norton, 2002) 118; Marc Bungenberg, "The Politics of the European Union's Investment Treaty-Making" in Broude et al, *supra* note 169 at 133.

was described by Milner as "vast" in 1999.[171] By contrast, while there was serious interest in investment among political scientists in the 1970s, a two-decade lull followed in the 1980s and 1990s.[172] Writing in 2003, Frieden and Martin argued for a revival of political science work on investment, which they characterized as "relatively neglected."[173] Since then, interest has picked up. Political scientists have focused significant attention on decisions by countries, especially developing countries, to adopt a particular policy in relation to foreign investment: BITs and free trade agreements with investment chapters.[174] Another focus of political science research on international investment has been the impact of domestic political factors on the attractiveness of particular locations to foreign investors.[175] Political science analysis of IEL other than trade and investment is rare.[176]

In the last decade or so, historical research techniques have been used effectively to explain the development of trade and investment rules, their purpose, and intended meaning.[177] For example, Kate Miles's investigation of the history of international investment law treaty-making provides insights into the intended scope of the substantive standards of investment protection and the purpose and design of investor-state dispute

171. For early examples, see Helen V Milner, "The Political Economy of International Trade" (1999) 2 Annual Rev Political Science 91, citing Richard Caves, "Economic Models of Political Choice: Canada's Tariff Structure" (1976) 9:2 Can J Economics 278; Jonathan Pincus, "Pressure Groups and the Pattern of Tariffs" (1975) 83:4 J Political Economy 757.

172. Early work in the 1970s includes Raymond Vernon, *Sovereignty at Bay* (New York: Basic Books, 1971); Richard J Barnet and Ronald E Müller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974); Robert Gilpin, *U.S. Power and the Multinational Corporation: the Political Economy of Foreign Direct Investment* (New York: Basic Books, 1975).

173. Frieden & Martin, *supra* note 170 at 119.

174. See e.g. Andrew Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va J Intl L 639; Sonal Pandya, "Political Economy of Foreign Direct Investment: Globalized Production in the Twenty-First Century" (2016) 19 Annual Rev Political Science 455. Pandya describes this as the most studied issue related to FDI promotion (at 460).

175. See e.g. Pandya, *supra* note 174 at 462-463.

176. Tomer Broude, Marc Busch & Amelia Porges, "Introduction: Some Observations on the Politics of International Economic Law" in Broude et al, *supra* note 169 at 11. Exceptions are Douglas Arner, "The Politics of International Financial Law" in Broude et al at 136; Beth A Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs" (2000) 94:4 American Political Science Rev 819.

177. See e.g. Mona Pinchis-Paulsen, "Trade Multilateralism and U.S. National Security: The Making of GATT Security Exceptions" (2020) 41:1 Mich J Intl L 109; Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford: Oxford University Press, 2018).

settlement.[178] Historical analysis has been used both to justify and critique the current regime.[179]

2. *Empirical analysis*

The last two decades have seen a considerable expansion in empirical analyses of IEL.[180] Initially, lawyers sought simply to describe trends in the numbers, outcomes, and characteristics of WTO and investment dispute settlement proceedings.[181] More recently, lawyers, as well as economists and political scientists, have used a variety of quantitative techniques, especially regression analysis, as well as qualitative techniques like surveys and interviews, to try to explain why states and private actors behave as they do, including signing treaties and bringing dispute settlement cases.[182] A particular focus in investment law has been to test the assumption that a state's commitment to protect investors backed up by investor-state arbitration leads to increased inward investment.[183] While the preponderance of empirical studies in what has become a substantial literature show a positive relationship on this basic question, the evidence remains conflicting.[184]

More recently, new empirical approaches have been used that exploit the availability of large amounts of data on treaties and cases, as well as vastly increased processing power, and new analytical tools, including artificial intelligence, to analyze that data in unprecedented ways.[185] Many

178. Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge, UK: Cambridge University Press, 2013).

179. See e.g. St John, *supra* note 177 provides a critique. Weiler also develops a critical account but one more supportive of investment protection: Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Leiden: Martinus Nijhoff, 2013).

180. Jackson, "Reflections," *supra* note 86 at 20 (where Jackson emphasized the need for empirical research).

181. See e.g. Hudec, *Enforcing*, *supra* note 104; William Davey, *Pine & Swine: Canada-United States Trade Dispute Settlement: The FTA Experience and NAFTA Prospects* (Centre for Trade Policy and Law, 1996). The discussion here is on empirical work related to IEL rather than international economic activity, though, of course, the two are related. See Anne van Aaken, "The Role of Empirical Research in International Economic Law" in Cottier & Nadakavukaren *supra* note 5 at 52.

182. Gregory Shaffer & Tom Ginsburg, "The Empirical Turn in International Legal Scholarship" (2012) 106:1 AJIL 1 at 3-4. For a Canadian example, see Van Harten, "Arbitrator Behaviour," *supra* note 125, using systemic content analysis of arbitral tribunal awards.

183. UNCTAD, *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014* (Geneva: United Nations, 2014).

184. This evidence is reviewed by Beaulieu & O'Neill, *supra* note 27. Partly as a result of the conflicting evidence, a few political scientists have suggested alternative explanations for why countries enter into investment agreements. See e.g. Todd Allee & Clint Peinhardt, "Evaluating Three Explanations for the Design of Bilateral Investment Treaties" (2014) 66:1 World Politics 47.

185. Wolfgang Alschner, Joost Pauwelyn & Sergio Puig, "The Data-Driven Future of International Economic Law" (2017) 20:2 J Intl Econ L 217. This paper was the introduction to a special issue on new modes of empirical research and provides a much more detailed and sophisticated account of new

of these approaches use the text of trade and investment treaties and decisions in dispute settlement cases as data, permitting the comparison and analysis of thousands of treaties and cases. By unveiling patterns in treaty-making and decisions, this kind of analysis can test hypotheses, challenge assumptions, and produce new insights. For example, Alschner and Skougarevskiy found that African countries tended to accept investment treaty terms of developed country partners based on a textual analysis of more than 500 BITs.[186] The potential application of this kind of analysis is very broad.[187] Advocates even tout the power of big data analyses to predict treaty-making behaviour and the outcome of disputes.[188]

3. *Developments in theoretical approaches*

Prior to 1990, most IEL scholarship was more concerned with practical problem solving than theory, at least as that term is understood in the social sciences.[189] Rather than using a particular theoretical approach to develop ex ante hypotheses and then testing them empirically, IEL scholarship was dominated by rigorous black letter analysis of trade and investment treaties and dispute settlement cases, though some, like Jackson, developed theories based on such analysis and used them as the basis for normative prescription.[190] Beginning in the 1990s, a bewildering variety of theoretical approaches have been employed, though economics has tended to dominate.

As noted above, trade law scholarship is informed by the main economic theory underlying the trade system: the theory of comparative advantage. All texts on international trade include an account of the economic rationale for trade liberalizations and reasons to deviate from it.[191] Analysis of international investment law (as opposed to investment

empirical approaches, their merits and challenges. These techniques are not unique to IEL. See also Shaffer & Ginsburg, *supra* note 182. Shaffer and Ginsburg note that the 2010 Annual Meeting of ASIL was the first to include a panel on empirical approaches to international law (at 1, n 1).

186. Wolfgang Alschner & Dmitriy Skougarevskiy, "Rule-takers or Rule-makers? A New Look at African Bilateral Investment Treaty Practice" (2016) 4 Transnational Dispute Management J.

187. For example, it has been used to illuminate how differences in the characteristics of decision-makers in investment arbitration and WTO dispute settlement account for differences in the legitimacy of the two dispute settlement systems. See Joost Pauwelyn, "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists from Venus" (2015) 109:4 AJIL 761.

188. Alschner, Pauwelyn & Puig, *supra* note 185 at 225.

189. Trachtman, "Jackson," *supra* note 149 at 181.

190. *Ibid* at 178 (Trachtman calls this "meta-theory").

191. Shaffer & Puig, *supra* note 163 at 1. See Trebilcock et al, *supra* note 167, c 1, "The Evolution of International Trade Theory, Policy and Institutions" at 1.

activity), however has not traditionally been grounded in economic theory, though there have been recent attempts to fill this gap.[192]

Traditional international relations realist theory relating to economic and political power has been used to explain international trade and more recently, investment rules.[193] Economic approaches, however, including, in particular, rational choice theory, have been employed to challenge realists' power-based explanations.[194] In both areas, law and economics analyses are now commonplace. For example, Bagwell and Staiger, among others, argue that binding trade treaties including dispute settlement and enforcement seek to resolve a kind of prisoner's dilemma faced by states in which each party has an incentive to defect, even though all will be better off if everyone complies due to the inefficiencies induced by tariffs and other barriers to trade.[195] Sykes recently employed a modified version of this approach to explain investment treaties and their particular provisions.[196] Trade and investment dispute settlement has also been analyzed using law and economics approaches.[197] More recently, rational choice accounts have been challenged based on insights from behavioural economics.[198]

A very wide variety of other theoretical approaches, too numerous to catalogue here, have been developed to explain IEL. Petersmann was one of the first to advocate a theoretical approach to IEL that incorporates non-economic values, arguing that democratic participation and human

192. See e.g. Bonnitcha et al, *supra* note 162; Alan O Sykes, "The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design" (2019) 113:3 AJIL 482. In this 2019 work, Sykes described the economic analysis of investment treaties as in its "early stages" (at 482).

193. See e.g. Robert Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987); Todd Allee & Clint Peinhardt, "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions" (2010) 54:1 Intl Studies Q 1. See Mary E Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Leiden: Martinus Nijhoff, 2006) at 78-88 for an explanation and critique of regime theory.

194. See e.g. Robert Baldwin, "The Political Economy of Trade Policy: Integrating the Perspectives of Economists and Political Scientists" in Robert Feenstra, Gene Grossman & Douglas Irwin, eds, *The Political Economy of Trade Policy: Papers in Honor of Jagdish Bhagwati*, vol 1 (Cambridge, MA: MIT Press, 1996) at 147.

195. See Kyle Bagwell & Robert Staiger, *The Economics of the World Trading System* (Cambridge, MA: MIT Press, 2002). Similarly, Trebilcock, Howse & Eliason, use an economic framework to understand and critique trade law: Trebilcock et al, *supra* note 167.

196. Sykes, *supra* note 192.

197. Shaffer & Puig, *supra* note 163 at 3-4.

198. The rational choice literature is summarized and critiqued based on insights from behavioural economics in Anne van Aaken & Jurgen Kurtz, "Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism" (2019) 22:4 J Intl Econ L 601. Van Aaken and Kurtz characterize the contributions of behavioural economics to IEL as "in their infancy" at 608.

rights protection are essential normative foundations for a legitimate IEL regime.[199]

Interest in sociological explanations for the institutionalization of IEL norms has grown markedly since 2000.[200] Critical theoretical approaches to trade and investment law have emerged in the past two decades, often using historical analysis to challenge conventional views. For example, beginning in the 1990s, scholars applying Third World Approaches to International Law (TWAIL) have re-examined trade and investment law and its effects on developing countries with a focus on colonialism and the exploitation of power relations.[201] Marxist and feminist critiques have also been employed.[202]

A few scholars have engaged in efforts to come up with a "grand unified theory."[203] Rasulov, for example, draws on "legal realism, Marxism, and classical law and economics" to explain the effectiveness of IEL rules.[204] Carmody critiques common theoretical frameworks explaining WTO law,

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199. Ernst-Ulrich Petersmann, "International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order" in Ronald St J MacDonald & Douglas M Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Leiden: Martinus Nijhoff, 1983) 227. For a more developed conception see Petersmann, "The Future" *supra* note 133.

200. Shaffer & Ginsburg, *supra* note 182 at 7. Roberts and St John use an ethnographic method which they call an "abductive method" to understand the investment treaty reform process in UNCITRAL Working Group III involving close observation and interaction with negotiation participants to develop a conceptualization of what is going on. They describe this approach as "on the margins of international law and international relations" (Roberts & St John, *supra* note 130 at 97, 99). Shaffer has used a similar method to study the WTO (Gregory Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (Cambridge, UK: Cambridge University Press, 2021). Recently, Pauwelyn borrowed from complexity theory to posit that the international investment regime is a complex, adaptive system (Joost Pauwelyn, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed" (2014) 29:2 ICSID Rev 372). Pauwelyn, along with Morin and Hollway, have used the same approach to understand trade law (Jean Frédéric Morin, Joost Pauwelyn & James Hollway, "The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements" (2017) 20:2 J Intl Econ L 365).

201. James Thuro Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3:1 Trade L & Development 26. Gathii notes that TWAIL's origins can be traced back decades farther (at 46). Recent examples include Namit Bafna, "A TWAIL Perspective on WTO's Trade Facilitation Agreement" (2021) 22:1 Estey J Intl L & Trade Policy 15; and Olabisi D Akinkugbe, "Africanization and the Reform of International Investment Law" (2021) 53:1 Case W Res J Intl L 7.

202. See e.g. Akbar Rasulov, "The Discipline of International Economic Law at a Crossroads" in John Haskell & Akbar Rasulov, eds, *New Voices and New Perspectives in International Economic Law* (New York: Springer, 2019) 1; Emezat Mengesha, "Rethinking the Rules and Principles of the International Trade Regime: Feminist Perspectives" (2008) 78 Agenda: Empowering Women for Gender Equity 13.

203. David Collins, "Towards a Grand Unified Theory of International Economic Law" (2014) 12:2 Manchester J Intl Economic L 140.

204. Described in Rasulov, *supra* note 202 at 23.

including regime theory and economic theory, and, finding each wanting, proposes an integrated normative theory incorporating elements of law, justice, and community.[205]

Conclusion

Fifty years ago, "international economic law" was not a commonly used expression, much less a recognized academic discipline. Today, it is the explicit subject of specialized academic organizations, journals, and law school courses. But only some trade and investment law scholars identify their work as part of a discipline called IEL. Those working in other areas of international law directly related to international economic activity, like tax and monetary policy, and those concerned with the broad range of international rules and domestic policy that may affect international business activity—work that fits within the broad conception of IEL advocated by trade law scholars—typically do not acknowledge the connection between their work and IEL. Many recognize IEL's need to embrace rules beyond international trade and investment law that affect international economic activity to be coherent and comprehensive, but there is still relatively little IEL scholarship that succeeds in integrating multiple subjects.

Even conceived narrowly as international trade and investment law, however, IEL has changed dramatically in the past 50 years. In step with the massive expansion and transformation of international economic activity, and the associated explosion in international trade and investment rules, the academic study of IEL has grown tremendously. It now addresses issues like services, intellectual property, and dispute settlement. Increased clashes between international economic activity and trade and investment rules on the one hand, and other international rules, domestic interests, and policy-making on the other, has drawn the attention of legal scholars concerned about the environment, health, labour, human and Indigenous rights, development, and other policy priorities to IEL. Economists, political scientists, and others are increasingly engaged in the study of IEL, recognizing its key role in global governance. Ever more diverse and sophisticated theoretical approaches and research methods, often borrowed from other disciplines, are being employed to understand IEL. Critical analyses from a wide range of perspectives are reshaping how we understand IEL.

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205. Chios Carmody, "Theory and Theoretical Approaches to WTO Law" (2016) 13:2 Manchester J Intl Economic L 152. See also Frank J Garcia & Lindita V Ciko, "Theories of Justice and International Economic Law" in John Linarelli, ed, *Research Handbook on Global Justice and International Economic Law* (Cheltenham: Elgar, 2013).

World events, including the 2008 financial crisis and, more recently, the COVID-19 pandemic and the war in Ukraine, have forced a substantial reassessment of globalization with profound implications for the IEL rules that secure the global economic order. There is widespread skepticism regarding conventional claims about the benefits and costs of trade and investment liberalization and their distribution. Increasingly, governments are preoccupied with how to reconcile their national security concerns and the existential threat of climate change with economic growth through trade and investment. The war in Ukraine has fundamentally challenged the view that countries that trade do not go to war.[206] The progressive development of ever stronger and more intrusive multilateral trade rules and investment treaties undergirding an ever more integrated global economy which characterized most of the first four of the last five decades has slowed dramatically. Despite some recent small achievements, the multilateral trading system under the WTO is struggling.[207] The Doha round has failed to achieve a result and the Appellate Body has ceased to function. International investment law, especially its dispute settlement system, investor-state arbitration, is mired in a legitimacy crisis.

Nevertheless, new trade and investment treaties continue to be negotiated at the regional level, like the African Continental Free Trade Agreement in 2019 and the Regional Comprehensive Economic Partnership among China and 14 Asia-Pacific states in 2022.[208] Canada, in particular, continues to actively expand and reinvigorate its treaty network, through agreements like *CUSMA*, the *CPTPP*, and *CETA* consistent with its long-standing interest in rule-based economic governance.

Perhaps more important for the purposes of this survey, partly because of increased contestation regarding traditional norms of the global economic order, IEL scholarship has never been richer and its role never more important.

206. See e.g. Gonga et al, *supra* note 16.

207. For example, at the 12th Ministerial Conference in June 2022, WTO Members announced the successful conclusion of the Agreement on Fisheries Subsidies. See Agreement on Fisheries Subsidies, WTO Dec WT/L/1144 Ministerial Decision of 17 June 2022, 12th Sess, online (pdf): <docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf> [perma.cc/MAK8-45XT].

208. *Agreement Establishing the African Continental Free Trade Agreement*, 21 March 2018 (entered into force 30 May 2019, last signature 5 February 2021), online (pdf): <au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> [perma.cc/7EDX-DEF3]; *Regional Comprehensive Economic Partnership*, 15 November 2020 (entered into force 1 January 2022), online: <rcepsec.org/legal-text/> [perma.cc/M8YJ-NZYF].